Supreme Court, U.S.
FILED

No. 94-941685 APR 14 1995

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In The

# Supreme Court of the United States

October Term, 1994

KERR-MCGEE COAL CORPORATION,
a Delaware corporation,

*Petitioner,*

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; ROBERT REICH, as Secretary of Labor, United States Department of Labor; MINE SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; and INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Federal Mine Safety and Health Amendments Act of 1977 requires the Secretary of Labor to inspect the Nation's mines and allows "a representative" of miners to accompany the Secretary on his inspection. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), this Court explained that statutes should not be construed in a manner that infringes basic property rights unless such a construction is necessary to fulfill the purposes of the statute.

The question presented is whether the Secretary's interpretation of the Mine Act to permit nonemployee union organizers to be named miners' representatives at a nonunion mine in contravention of the mine operator's common-law right to exclude such persons from his property is a reasonable interpretation of the Act.

## PARTIES TO THE PROCEEDINGS

Petitioner Kerr-McGee Coal Corporation, a Delaware corporation, was petitioner before the court of appeals. Pursuant to S. Ct. Rule 29.1, petitioner notes that it is a wholly-owned subsidiary of Kerr-McGee Corporation, and has no subsidiaries of its own.

Respondents are the Federal Mine Safety and Health Review Commission; Robert Reich, Secretary of Labor, United States Department of Labor; and the Mine Safety and Health Administration of the United States Department of Labor, all respondents before the court of appeals, and the International Union, United Mine Workers of America, an intervenor before the court of appeals.

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No. 94-___

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Kerr-McGee Coal Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 40 F.3d 1257 and is reprinted in the appendix hereto ("App.") at App. 1. The opinion of the Federal Mine Safety and Health Review Commission is reported at 15 F.M.S.H.R.C. 352 and is reprinted at App. 22. The opinion of the Administrative Law Judge is reported at 13 F.M.S.H.R.C. 1889 and is reprinted at App. 44.

## JURISDICTION

The judgment of the court of appeals was entered on December 2, 1994. The court of appeals denied a timely combined petition for rehearing and suggestion of rehearing in banc on January 17, 1995. App. 71 - App. 72. The jurisdiction of the court of appeals was based on 30 U.S.C. § 816. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## PERTINENT STATUTORY AND REGULATORY PROVISIONS

Section 103(f) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 813(f), and 30 C.F.R. Part 40, are reproduced at App. 73 - App. 78.

## STATEMENT OF THE CASE

This case is about the property rights of mine operators. Specifically, this case concerns the right of the operator of a nonunion mine to exclude from its property nonemployee union organizers. The court of appeals held that right can be abrogated when miners designate a labor union their "representative" for purposes of the federal statute regulating mine safety, even though that union is not the miners' collective bargaining representative. Because of the unquestionable importance of this issue not only to mine operators but other property owners nationwide, this Court should review the decision of the court of appeals.

1. Section 103(a) of the Federal Mine Safety and Health Amendments Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 801 *et seq.*, requires the Secretary of Labor ("the Secretary") or his authorized representative to conduct health and safety inspections of the Nation's mines. 30 U.S.C. § 813(a). The Act also provides for the participation of miners and mine operators in the inspection process. Under Section 103(f) of the Mine Act, "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine." 30 U.S.C. § 813(f). App. 73. The Secretary, acting through the Mine Safety and Health Administration ("MSHA"), has promulgated regulations concerning miners' representatives. 30 C.F.R. Part 40 ("Part 40"). These regulations define the term "representative of miners" to mean "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act."

30 C.F.R. § 40.1(b)(1). App. 75.[1] *See generally Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 774-75 (1994).

2. Petitioner Kerr-McGee Coal Corporation is the operator of the Jacobs Ranch Mine, a surface coal mine located in the Powder River Basin near Gillette, Wyoming. Approximately 270 miners work at the Jacobs Ranch Mine. The Jacobs Ranch Mine is, and always has been, nonunion. At all times, petitioner has asserted its right to exclude unions and nonemployee union organizers from its private property. App. 24.

In April 1990, Dallas Wolf, an organizer for the United Mine Workers of America ("UMWA"), moved to Gillette for the express purpose of unionizing miners in the Powder River Basin, including miners at the Jacobs Ranch Mine. In July 1990, at the urging of Wolf, seven Jacobs Ranch miners filled out forms designating the UMWA, Wolf and Robert Butero, another UMWA official, as their Section 103(f) representatives. Wolf subsequently mailed copies of the designation forms to petitioner and the MSHA district office in Denver, Colorado. Petitioner, however, did not post the designation form on its bulletin board, as the regulations require. 30 C.F.R. § 40.4. App. 25; App. 77.

Petitioner refused to post the form because it believed that the designation of the UMWA and two

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[1] The Secretary allows as few as two miners to appoint a representative and will accept multiple representatives. Part 40, coupled with other Mine Act rules, allows a representative to independently review certain documents and participate as a party in litigation between a mine operator and the Secretary. *See* n.2, *infra* at 9, and accompanying text at 8-9.

UMWA officials as representatives was improper and invalid. The miners at Jacobs Ranch are not represented by the UMWA or any other union. Nor have they ever been. Thus, the designation of Wolf and Butero as miners' representatives (and by only seven of the 270 or so Jacobs Ranch miners at that) was, in petitioner's view, an undisguised attempt on the part of the UMWA to infiltrate the mine for its organizing activities. Petitioner therefore concluded that it was under no obligation to permit such nonemployee union organizers to intrude upon its private property and that it would not acknowledge any such obligation by posting the designation form submitted by the UMWA. App. 25.

On October 25, 1990, an MSHA inspector issued a citation to petitioner for its failure to post the UMWA's designation form. Approximately 15 minutes later, the inspector issued an order of withdrawal for petitioner's refusal to abate the alleged violation of the posting regulation. Petitioner finally posted the form designating the UMWA, Wolf and Butero as representatives when it was informed by the MSHA district manager that daily penalties would be assessed for failure to do so. App. 26 - App. 27.

3. Petitioner sought review of the citation and order before an Administrative Law Judge ("ALJ") of the Federal Mine Safety and Health Review Commission ("the Commission"). Petitioner argued before the ALJ that it was not required to recognize the UMWA as a miners' representative, but the ALJ disagreed and upheld the issuance of the citation and the withdrawal order. App. 68. The ALJ also assessed petitioner a civil penalty of $300. The Commission affirmed the ALJ's decision. App.

69. *See also Thunder Basin*, 114 S. Ct. at 775 n.6 (recounting the administrative proceedings in this case).

4. Petitioner filed a petition for review of the Commission's decision with the United States Court of Appeals for the District of Columbia Circuit. In that forum, petitioner challenged the Secretary's interpretation of the Act to allow nonemployee union officials to serve as representatives of miners at a nonunion mine. Petitioner argued, among other things, that by requiring it to permit nonemployee union officials onto its private property, the Secretary's rule contravened this Court's recent decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which recognized "an employer's right to exclude nonemployee union organizers from his property." *Id.* at 532. The court of appeals, however, rejected all of petitioner's arguments and denied the petition for review.

The court held that "the conclusion that the Act does not preclude non-elected unions from acting as miners' representatives is reasonable" and that petitioner's reliance upon *Lechmere* was "misplaced." App. 12; App. 16. With respect to the former holding, the court of appeals in large measure simply followed the pre-*Lechmere* decision of the Tenth Circuit in *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (1990). Judge Sentelle filed a concurring opinion expressing doubts about the constitutionality of Section 103(f) of the Mine Act insofar as it "compel[s] mine owners to permit onto their premises private individuals whose only claim to presence is selection by two of the property owners' employees." App. 20.

## REASONS FOR GRANTING THE PETITION

The court of appeals upheld the Secretary's interpretation of the Mine Act to permit as few as two miners at a nonunion mine to designate a labor union as their "representative" for purposes of Section 103(f) of the Mine Act, thereby annulling the mine owner's common law property right to exclude union officials from its property. Further review of that decision is warranted because of the importance of the issues presented herein and because the court of appeals' decision is contrary to *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

1. The Secretary's interpretation of the Mine Act, which permits miners at a nonunion mine to designate a labor union as their Section 103(f) representative, flies in the face of a mine owner's right to exclude nonemployee union organizers from its property. An unwavering line of decisions rendered by this Court establishes that "this right to exclude others is 'one of the most essential sticks in the bundle of rights commonly characterized as property.' " *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). *Accord, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (this Court has "repeatedly held" that the right to exclude is essential); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1528 (1992) (that the right to exclude is essential "is doubtless"); *Dolan*, 114 S. Ct. at 2324-25 (Stevens, J., dissenting) (limitations upon the right to exclude "constitute[ ] a significant infringement upon property ownership"). *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property

rights."); *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially) ("The notion of property starts, I suppose, from confirmed possession of a tangible object, and consists in the right to exclude others from interference with the more or less free doing with it as one wills.").

This right to exclude all persons from one's property obviously includes the right "to exclude particular individuals," *Yee v. Escondido*, 112 S. Ct. at 1530, at least where the property has not been opened up to the public at large. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Accordingly, there can be no doubt that an employer has a common-law right to "exclude nonemployee union organizers from his property," *Lechmere, Inc. v. NLRB*, 502 U.S. at 532, even though he may permit others upon it.

The impact upon petitioner's mine operation of the loss of its right to exclude unions from its property is not merely theoretical. By allowing unions and union officials to become miners' representatives, the Secretary's rule upsets the proper balance between mine operators and unions. To begin with, the right to accompany government inspections affords a union an opportunity to inspect mine records and come into contact with mine workers that it would not otherwise enjoy. Furthermore, representative status gives a union considerable statutory

rights that can be used as leverage against a mine operator who resists the union's organizational efforts. In particular, a representative can compel the Secretary to make an immediate inspection of a mine upon notice to the Secretary of a perceived mine hazard. 30 U.S.C. § 813(g)(1); 30 C.F.R. §§ 43.4(a), 43.5(a).[2] Finally, representative status confers an imprimatur of federal authority – a "deceptive cloak of authority with which to persuasively elicit additional employee support." *ILGWU v. NLRB*, 366 U.S. 731, 736 (1961). *See Columbia Tanning Corp.*, 238 NLRB 899, 900 (1978) (NLRB election set aside where state labor commissioner sent letter endorsing union).

Thus, as Justice Scalia said in *Thunder Basin*, allowing unions to participate in inspections causes demonstrable harm to a mine operator's property rights because it

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[2] A representative can also point out alleged mine hazards prior to or during an inspection and if the Secretary does not issue a citation with respect to such alleged hazards, the representative is entitled to review of that decision. 30 U.S.C. § 813(g)(2); 30 C.F.R § 43.7. Additionally, a representative may: request certain enforcement actions against a mine operator, 30 U.S.C. §§ 815(d), 817(e)(1); contest the time an operator is given to abate a Mine Act violation, *id.* § 815(d); inspect certificates of miners' completion of mandatory training programs at the mine site, *id.* § 825(c), 30 C.F.R. §§ 48.9, 48.29; initiate proceedings to modify mine health and safety standards, 30 C.F.R. § 44.3; and participate as a party in any litigation before the Commission between MSHA and a mine operator. 29 C.F.R. § 2700.4. *See also Thunder Basin*, 114 S. Ct. at 774 n.3.

> compel[s] the company to allow union officials to enter its premises (and in a position of apparent authority, at that), notwithstanding its common-law right to exclude them, *cf. Lechmere, Inc. v. NLRB*. And compliance will provide at least some confidential business information to officers of the union. [*Thunder Basin*, 114 S. Ct. at 783 (opinion concurring in part and concurring in the judgment) (citation abbreviated).]

The practical significance of the Secretary's regulation allowing unions to serve as representatives is exacerbated by the fact that the same regulation also permits a representative to be selected by as few as two miners, no matter how large the mine or whether a majority of miners wishes to be nonunion. *See* 30 C.F.R. § 40.1(b)(1) ("*Representative of miners* means: Any person or organization which represents two or more miners at a coal or other mine for purposes of the Act."). App. 75. The consequence of this regulation, as the court of appeals noted, is that "an 'organization' that represents less than 50% of the miners may act as a miners' representative under the Secretary's regulations." App. 10. In promulgating this regulation, the Secretary rejected the suggestion that "representatives should be elected by a majority" of miners even while acknowledging that "the 'majority rule' concept is a fundamental component of the [National Labor Relations Board] definition of representative, which contemplates only one union miner representative at each mine." Preamble to 30 C.F.R. Part 40 Regulations, 43 Fed. Reg. 29508, 29508 (July 7, 1978).[3]

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[3] There is a substantial argument that the "two miners" rule contravenes the plain language of the Mine Act. In dictum, the

The effect of the Secretary's regulation, then, is that a representative can be anointed as such by just two miners at an operation employing hundreds of workers, even if a majority of miners vote to be nonunion. In this case, only seven of the approximately 270 miners at Jacobs Ranch picked the UMWA officials as their Section 103(f) representative. App. 24-App. 25. This result contravenes the fundamental labor law principle that for a union to represent any group of employees, it must be selected by a majority of the employees in an appropriate bargaining unit of workers. This radical departure from federal labor law principles underscores the damage to petitioner's property interests.

Under the Secretary's rule, there is nothing to prevent the selection of a mine operator's competitor, an anti-mining activist, a striking miner, or literally anyone else as a representative. Furthermore, the Secretary's position allows as few as two miners at a union mine to appoint as their "representative" a union other than the one duly certified as the mine's collective bargaining representative under the National Labor Relations Act

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court of appeals in this case approved of that rule, but did so on the basis of a faulty reading of the Act. The court said that "[t]he statute provides only that the representative must be 'authorized by *his* miners.'" App. 5 (quoting 30 U.S.C. § 813(f)) (emphasis added). That construction, which reads the word "his" to refer to "the representative," makes it seem as if all that is required is for a representative to represent more than one miner ("his miners"). In fact, the "his" in the sentence in question refers not to the representative, but to the operator of the mine. *See* 30 U.S.C. § 813(f) ("a representative of the *operator* and a representative authorized by *his* miners") (emphasis added). App. 73.

("NLRA"), 29 U.S.C. § 151 *et seq.* These absurd results are made possible by the Secretary's rule. The court below conceded that petitioner's argument that the Secretary's reading of the Act could lead to such "anomalous results" had "intuitive appeal," App. 14, just as the Tenth Circuit in *Utah Power & Light* "recognize[d] that in some circumstances 'walkaround rights may be abused by non-employee representatives.' " App. 14 (quoting *Utah Power & Light*, 897 F.2d at 452).

2. The court of appeals erred in concluding that the Secretary's rule, which runs roughshod over the property rights of mine operators and produces bizarre results, is a reasonable interpretation of the Mine Act.

a. The error of the court of appeals is demonstrated by this Court's decision in *Lechmere, Inc. v. NLRB, supra.* In that case, nonemployee union organizers sought to organize the workers at a retail store operated by Lechmere, Inc. As part of their efforts, the union placed handbills upon the windows of cars in the employees' area of Lechmere's parking lot. When Lechmere barred the union from its premises, the union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "the Board"). The NLRB ruled in the union's favor and the court of appeals enforced the Board's order. This Court, however, reversed.

The union's attempt to contact Lechmere's employees by trespassing upon Lechmere's parking lot required this Court to resolve a conflict of competing legal rights. On the one hand, the Court recognized that Section 7 of the NLRA, 29 U.S.C. § 157, gives employees "the right to self-

organization" and that this right will sometimes be meaningless unless employees are able "to learn the advantages of self-organization from others." 502 U.S. at 532 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)).[4] On the other hand, the Court recognized that an employer has the "right to exclude nonemployee union organizers from his property." 502 U.S. at 532. Therefore, the Court found it necessary to balance these two important rights by reaching an "accommodation between employees' Section 7 rights and employers' property rights." *Id.* at 534 (citing *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972); and *Babcock*, 351 U.S. at 112).[5] Reaffirming prior decisions, the Court held that the proper balance is struck by the rule that nonemployee union organizers may not trespass upon an employer's property unless the union has no other reasonable means of communicating its organizational message to the employees. 502 U.S. at 533-35.

The central lesson of *Lechmere* and its ancestry is that "the right to exclude from property has been required to yield" in certain circumstances, but only "*to the extent needed* to permit communication of information on the right to organize." *Babcock*, 351 U.S. at 112 (emphasis added); *accord Lechmere*, 502 U.S. at 534. That lesson, however, was quite lost on the court of appeals, which

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[4] The Court noted that, because "the NLRA confers rights only on *employees*," 502 U.S. at 532, a union's rights exist "only derivatively," *id.* at 533.

[5] *See also Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978).

failed to apply *Lechmere* in construing the Mine Act. Section 103(f) of the Mine Act, like Section 7 of the NLRA, is not heedless of the mine operator's property rights. Therefore, as in *Lechmere*, a mine operator's right to exclude nonemployee labor organizers, and others, should be made to yield only insofar as is necessary (App. 25, n.4) – "to the extent needed" – to effectuate the right of miners to be represented during mine inspections. *Cf. Donovan v. Dewey*, 452 U.S. 594, 599 (1981) (although Fourth Amendment permits warrantless inspections of mines pursuant to the Mine Act, such inspections "may be unreasonable if they are * * * unnecessary for the furtherance of federal interests").

It should be obvious that it is not at all necessary for union officials to be representatives in order for miners to participate in mine inspections. Quite to the contrary, in adopting the Mine Act, Congress contemplated that representatives would generally – if not exclusively – be drawn from the ranks of miners themselves. *See* S. Rep. No. 95-181, 95th Cong., 1st Sess. 35 (1977); Mine Safety & Health Admin., *Section 103(f) of the Federal Mine Safety and Health Act of 1977 – Interpretive Bulletin*, 43 Fed. Reg. 17546, 17546 (Apr. 25, 1978); 123 Cong. Rec. 20,020 (1977) (statement of Sen. Javits); Collyer & Klise, *Rights of Mine Access for Miners' Representatives*, 95 W. Va. L. Rev. 617, 619, 642 (1993). There is nothing special about the capability or availability of union representatives that make it essential or even especially important for them to accompany a government mine inspection. This is particularly true when that union has no collective bargaining representative status under the NLRA.

In *Lechmere, Donovan* and *Dolan,* there were asserted governmental regulatory interests arrayed against the interests of the property owner. Here, however, there is no suggestion that the objectives of Section 103(f) cannot be fully achieved without allowing nonemployee union organizers access to the mine operator's nonunion mine. There has been no showing that allowing as few as two employees in a workforce of nearly three hundred non-union employees to make nonemployee union organizers "representatives" of miners – when 92 of petitioner's employees have already been designated by fellow employees to assist the Secretary (App. 25, n.4) – in any way is needed to promote mine safety, the sole concern of Section 103(f). Nonemployee union organizers are not needed to assist MSHA inspectors at petitioner's mine. Under *Lechmere,* the court below therefore should not have read the statute to sanction such a stark intrusion on petitioner's property rights.

b. The language of Section 103(f) itself suggests that a union or union officials cannot be a "representative" for purposes of Section 103(f) if they seek that status in order to further their organizational aims. Section 103(f) provides that a representative can be designated as such "for *the* purpose of aiding [the Secretary's] inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. § 813(f) (emphasis added). App. 73. A "representative" whose purpose is not just to ensure mine safety, but also to unionize mine workers, therefore cannot be a representative under the Act. The plain language of the Mine Act precludes the participation in inspections of such "mixed motive" representatives. In this case, the court of appeals observed that "[t]he parties

agree one of the UMWA miners' representatives [Wolf] had relocated to Wyoming 'for the purpose of unionizing the coal miners in the Powder River Basin, including the miners at the Jacobs Ranch Mine.' " App. 6. And although Butero did not move to Wyoming, his motives dovetailed with those of Wolf. It is clear, then, that Wolf and Butero were not devoted to *the* purpose of miner safety, but had other reasons for seeking to serve as a miner's safety representative.

c. That the Secretary's interpretation allowing anyone to be a miners' representative is unreasonable is highlighted by the fact that the Secretary has reached a different conclusion with respect to his interpretation of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. §§ 651 *et seq.* Like Section 103(f) of the Mine Act, Section 8(e) of OSHA provides for workers' representatives to accompany the Secretary's inspection of the Nation's workplaces. 29 U.S.C. § 657(e).[6] Although the language of Section 657(e) is virtually identical to the language of Section 103(f), the Secretary has construed the former in a far more narrow way. 29 C.F.R. § 1903.8(c) provides that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer"

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[6] The first sentence of 29 U.S.C. § 657(e) provides:
Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection.

unless good cause is shown why a third party is "reasonably necessary to the conduct of an effective and thorough" inspection.

Notably, the Secretary's original interpretation of the Mine Act was along the same lines as this interpretation of OSHA. In an interpretive bulletin issued the same time that the Mine Act took effect, MSHA declared:

> Section 103(f) provides an opportunity *for the miners,* through their representatives, *to accompany* inspectors * * * . Several important purposes are served by affording representatives of miners the opportunity to accompany Mine Safety and Health Administration (MSHA) inspectors. Participation by miners' representatives will enhance *miner safety and health awareness* and contribute to greater understanding by miners of the safety and health requirements of the Act. In addition, participation in the inspection process by representatives of miners will directly aid the inspection itself by providing information *through individuals familiar with day-to-day conditions at the mine site.* [43 Fed. Reg. 17546 (April 25, 1978) (emphasis added).]

The italicized language indicates that it was MSHA's understanding that miners' representatives would themselves be miners. In particular, the last sentence quoted above – which equates "representatives of miners" with persons "familiar with day-to-day conditions at the mine site" – can only refer to miners.

The court of appeals' conclusion that nonemployee union organizers can be qualified as miners' representatives rested in large part upon the language in Section 103(f) providing that a "representative of miners *who is*

*also an employee of the operator* shall suffer no loss of pay" during the time spent inspecting the mine. Adopting the conclusion of the Tenth Circuit in *Utah Power & Light*, the D.C. Circuit said that the italicized language "appears to contemplate that miners may designate third parties to represent them." App. 11. Those courts, however, read far too much into that phrase when they construed it to mean that literally anyone can serve as a miners' representative. Both the D.C. Circuit and the Tenth Circuit, in fact, conceded that the legislative history of the Mine Act evinces a congressional desire to have miners themselves participate in mine inspections. App. 12; 897 F.2d at 451. Therefore, the relevant statutory term – "a representative authorized by [the operator's] miners" (30 U.S.C. § 831(f)) – is best read to mean one of the miners themselves or the miners' certified collective bargaining representative. Only this reading does justice to Congress' vision of miner participation in inspections, the language of Section 103(f), the ordinary meaning of the term "representative" in federal labor law, and the property rights of mine operators. Such a reading also comports with the Secretary's construction of the term "representative" of employees in the context of the Occupational Safety and Health Act's inspection provisions and his near contemporaneous interpretation of the Mine Act as reflected by the interpretive bulletin of April 25, 1978.

3. Judge Sentelle explained in his concurring opinion that "there is a question of constitutional dimension lurking behind today's decision – a question based on the same constitutional presumption that I believe underlies *Lechmere, Inc. v. NLRB*." App. 20. (citation abbreviated). He concurred in the majority's ruling because the parties

had not raised the constitutional question, App. 20, but the issue Judge Sentelle saw "lurking" in the court's decision should have informed the court's statutory construction, and led it to interpret Section 103(f) in such a manner as to avoid, rather than to pose, the constitutional question that troubled him.

As this Court reiterated recently, in statutory construction "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked." *United States v. X-Citement Video*, 115 S. Ct. 464, 470 (1994) (quoting *Yates v. United States*, 354 U.S. 298, 319 (1957)). *See, e.g., X-Citement Video*, 115 S. Ct. at 472 ("It is * * * incumbent upon us to read the statute to eliminate [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress."); *Cheek v. United States*, 498 U.S. 192, 203 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[7]

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[7] This principle is no less applicable when an agency rather than a court construes a statute in the first instance. In *National Treasury Employees Union v. FLRA*, 986 F.2d 537 (D.C. Cir. 1993), the court reversed an agency's decision for failing to "consider the constitutional implications of its choice between permissible interpretations of the Statute." *Id.* at 539. The Court observed that "[i]t is a commonplace, of course, that 'constitutional policy can provide a valuable aid in determining the legitimate boundaries of statutory meaning,' Singer, 2A *Sutherland Statutory Construction* § 56.02 (4th ed. 1984) – and no less, we suppose, when an agency rather than a court is reading the statute." *Id.*

*Lechmere* refused to "reach any issue of deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) before first determining whether the NLRB was acting consistently with the Court's prior interpretations of the NLRA. 502 U.S. at 536. Likewise, here, any issue of deference to

The cases cited above make clear that, as Judge Sentelle explained, a reading of Section 103(f) that requires a nonunion mine owner to grant access to its mine to union representatives – simply because of their selection by as few as two miners to accompany safety inspectors – would raise the most serious constitutional questions:

> [I]t is fundamental to our constitutional system of limited government that no person can "be deprived of * * * property, without due process of law * * * ." U.S. Const. amend. V. * * *
>
> To say that the Congress can constitutionally pass laws permitting inspections of mine premises is one thing; to say that it can compel mine owners to permit onto their premises private individuals whose only claim to presence is selection by two of the property owners' employees is quite another. [App. 20 (concurring opinion).]

Judge Sentelle's concern is not an idle one, for there is a substantial argument that interpreting Section 103(f) to require mine owners to allow trespassers onto their property without compensation violates the Takings Clause. In *Nollan v. California Coastal Comm'n, supra,* this Court said: "[w]e have repeatedly held that, as to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the

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**administrative decisionmaking can be addressed only after evaluating the Secretary's interpretation of Section 103(f) in light of the consistent authority of this Court, which has read statutes to abrogate fundamental private property rights only when plainly necessary to fulfill the statutory purpose. Neither the court of appeals, nor the Commission before it, analyzed this critical first issue.**

bundle of rights that are commonly characterized as property" and that "our cases uniformly have found a taking" where "governmental action results in a permanent physical occupation of the property, by the government itself or by others." 483 U.S. at 831 (internal quotation marks and citations omitted). Following the reasoning of those cases, the Court found it "obvious" and expressed "no doubt" that a taking occurs when government "requir[es] uncompensated conveyance of [an] easement." *Id.* at 831, 834. That is essentially the effect of Section 103(f), which requires mine owners to give, without compensation, a right of way not just to federal mine inspectors, but to any person that as few as two miners deign to designate their "representative." If that is not obviously a taking under *Nollan*, it is at the very least an extremely close question.

Petitioner's reading would avoid the serious constitutional question posed by the D.C. Circuit's statutory construction. Petitioner's interpretation is also plainly consistent with the intent of Congress; it is in fact the same reading the Secretary himself gives the virtually identical statutory language in the Occupational Safety and Health Act. The court below erred in adopting the Secretary's reading of the Mine Act.

4. That the issues raised by this case are important ones deserving of this Court's attention is implicit in *Thunder Basin Coal Co. v. Reich, supra.* There, as here, miners at a nonunion coal mine selected two UMWA employees as their miners' representatives, but the mine operator refused to post the form designating the union officials as such. When MSHA instructed Thunder Basin to post the form, Thunder Basin filed suit in federal

district court to enjoin the application of the very same regulation at issue in this case. The underlying claims made by the petitioner in *Thunder Basin* were virtually identical to the claims of petitioner here. The United States District Court for the District of Wyoming granted Thunder Basin's request for an injunction but the Tenth Circuit reversed, holding that the Mine Act precluded Thunder Basin's pre-enforcement challenge. This Court granted certiorari to decide whether the important legal questions raised by Thunder Basin on the merits must first be heard in an administrative forum, and ultimately upheld the Tenth Circuit's decision. This Court should now grant certiorari in this case to decide those questions on the merits.

*Thunder Basin*, the decision below, and the Tenth Circuit's decision in *Utah Power & Light* confirm that the question presented here is not only important but recurring. As noted, the significance of that question is not limited to the Mine Act; the same issue arises under the virtually identical language of the Occupational Safety and Health Act. Finally, the decision of the court below not to follow *Lechmere*'s guidance in construing statutes which may infringe basic property rights raises a fundamental question of far-reaching significance.

5. For the foregoing reasons, this Court should grant the petition and set the case for plenary consideration. Should the Court not do so, the petition should nevertheless be held pending this Court's disposition of *NLRB v. Town & Country Electric, Inc.*, No. 94-947, *cert. granted*, 115 S. Ct. 933 (Jan. 23, 1995), opinion below, 34 F.3d 625 (8th Cir. 1994).

In that case, Town & Country, a nonunion electrical contractor, refused to hire two union organizers (and several other union members) who had applied for positions with Town & Country in order "to organize its workers." 34 F.3d at 629. The NLRB found that Town & Country had thereby committed an unfair labor practice, but the Eighth Circuit disagreed. Observing that the NLRA "confers rights only on *employees*," *id.* at 627 (quoting *Lechmere*, 502 U.S. at 532), the court of appeals held that the union organizers and members were not "employees" within the meaning of the NLRA. Finding the NLRA's definition of "employee" to be of "little help," 34 F.3d at 628, the court looked to principles of agency law to shed light on the meaning of that term.[8] The court concluded that in view of the duty of undivided loyalty an agent owes his principal, the union personnel could not be considered "employees" of Town & Country because their loyalty to the union would represent "an inherent conflict of interest." *Id.* at 629.

It would be appropriate, at the least, for this Court to hold this petition pending its decision in *Town & Country*. The court of appeals in *Town & Country* held that the NLRB's construction of the term "employee" to include "a union official [who] applies for a position only to further the union's interests" (34 F.3d at 629) was unreasonable because such an "employee" would not be

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[8] The court stated that "[w]hen a federal statute does not helpfully define the term 'employee,' we infer that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." 34 F.3d at 628 (citing *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992)) (internal quotation marks omitted).

deemed an agent in the eyes of the law. In this case, the court of appeals erred by failing to take a similar approach when construing the Mine Act's use of the term "representative" – a term which also connotes an agency relationship.[9] Just as union organizers because of their divided loyalties cannot be considered "employees" of a firm they are trying to organize, so too here a labor union cannot "represent" nonunion mineworkers for purposes of participating in a mine inspection, or in other Mine Act proceedings, where the union's ulterior motive is the desire to organize the mine.[10] An agent, whether dubbed an employee or a representative, cannot serve two masters. *See Town & Country*, 34 F.3d at 628 (a servant ordinarily cannot provide "simultaneous service for two independent employers") (citing Restatement (Second) of Agency § 226 comment a (1957)).

It seems clear this Court's decision in *Town & Country* is likely to provide valuable guidance on these issues as they arise in the present case. If the Court decides not to grant this petition, the petition should be held pending

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[9] It is at least as appropriate to derive the meaning of the word "representative" through the use of agency law principles as it was in *Town & Country* to apply that interpretive technique to the word "employee." The NLRA at least defines the word "employee" – even though the Eighth Circuit viewed the definition as "not helpful[ ]." 34 F.3d at 628. Neither the Mine Act, nor Part 40, by contrast, provide definitions of the terms "representative" or "represents." *See* 30 U.S.C. § 802 (setting forth definitions) and Part 40.

[10] The court of appeals in this case noted that the parties agreed below that the UMWA had moved to the area of petitioner's mine "for the purpose of unionizing the coal miners." App. 6.

decision in *Town & Country*, and disposed of as appropriate in light of that decision.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending decision in *NLRB v. Town & Country Electric, Inc.*, No. 94-947, and disposed of as appropriate in light of the decision in that case.

Respectfully submitted,

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**KERR-McGEE COAL CORPORATION,**
**Petitioner,**

**v.**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, et al., Respondents.**

**International Union, United Mine Workers of America, Intervenor.**

**American Mining Congress; National Coal Association; Wyoming Mining Association, amici curiae.**

**No. 93-1250.**

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 4, 1994.

Decided Dec. 2, 1994.

Rehearing and Suggestion for Rehearing In Banc Denied Jan. 17, 1995.

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Petition for Review of an Order of the Federal Mine Safety & Health Review Commission.

Charles W. Newcom, Denver, CO, argued the cause and filed the briefs, for petitioner.

Colleen A. Geraghty, Atty., U.S. Dept. of Labor, Washington, DC, argued the cause for respondents. With her on the brief was W. Christian Schumann, counsel, U.S. Dept. of Labor, Washington, DC, L. Joseph Ferrara, Atty., Federal Mine Safety and Health Review Com'n, Washington, DC, entered an appearance.

Robert H. Stropp, Jr., Washington, DC, filed the brief for intervenor. Mary L. Jordan, Washington, DC, entered an appearance.

Thomas C. Means, J. Michael Klise, Mark G. Ellis, and Harold P. Quinn, Washington, DC, filed the brief, for amici curiae.

Before: SILBERMAN, SENTELLE, and ROGERS, Circuit Judges.

Opinion for the court by Circuit Judge ROGERS.

Concurring opinion by Circuit Judge SENTELLE.

ROGERS, Circuit Judge:

This appeal presents the question whether a non-elected labor organization can serve as a miners' representative at a non-unionized mine under the Federal Mine Safety and Health Amendments Act of 1977 (the "Act"). Petitioner Kerr-McGee Coal Corporation seeks review of a decision by the Federal Mine Safety and Health Review Commission requiring Kerr-McGee to recognize the United Mine Workers of America and two of its employees as miners' representatives. Kerr-McGee contends that unions and other third parties may not serve as miners' representatives unless a majority of miners has appointed them as a collective bargaining agent under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (as amended) (1988) ("NLRA"), since any other interpretation would create "significant problems counterproductive to health and safety." In view of the broad grant of authority to the Secretary of Labor, however, the interpretation of the Act proposed by the Secretary and adopted by the Commission does not conflict with the

language of the statute or its legislative history and is therefore "reasonably defensible." *Simpson v. Federal Mine Safety and Health Review Comm'n*, 842 F.2d 453, 458 (D.C.Cir.1988). Finally, Kerr-McGee's reliance on *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992), is misplaced in view of the fact that Congress has determined the appropriate accommodation between mine owners' property interests and the safety objectives of the Act. Accordingly, we deny the petition for review.

I.

The Federal Mine Safety and Health Amendments Act of 1977,[1] which Congress enacted "to promote safety and health in the mining industry,"[2] vests broad authority in the Secretary of Labor to promulgate regulations governing the mining industry and to investigate and remedy safety concerns.[3] Under § 103(a) of the Act, the Secretary is to make "frequent" inspections of mines,

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[1] Pub.L. No. 95-164, 91 Stat. 1290 (1977) (codified at 30 U.S.C. §§ 801 *et seq.* (1988)).

[2] H.R. CONF.REP. No. 655, 95th Cong., 1st Sess. 1 (1977), U.S.Code Cong. & Admin.News 1977, pp. 3401, 3485. The Act amends and modifies the Federal Coal Mine Health and Safety Act of 1969, Pub.L. No. 91-173, 83 Stat. 742, by combining its miner protection provisions with those of the Nonmetallic Mine Safety Act of 1966, Pub.L. No. 89-577, 80 Stat. 772 (formerly codified at 30 U.S.C. §§ 721-740), *repealed by* § 306(a) of the Act, *supra* note 1, 91 Stat. at 1322. *See Council of Southern Mountains, Inc. v. Federal Mine Safety & Health Review Comm'n*, 751 F.2d 1418, 1419 (D.C.Cir.1985).

[3] The Act also charges the Federal Mine Safety and Health Review Commission, an independent entity, with adjudicating disputes arising under the Act. *See* §§ 101 & 113; 30 U.S.C. § 811.

including periodic visits "(1) [to] obtain[], utiliz[e], and disseminat[e] information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines[, and] (2) [to] gather[] information with respect to mandatory health or safety standards." 30 U.S.C. § 813(a). In addition, each year the Secretary must make at least two unannounced inspections of each surface mine for the purpose of "(3) determining whether an imminent danger exists, and (4) determining whether there is compliance" with the statutes and regulations that govern mines. *Id.*

In order to encourage miner awareness of health and safety concerns, Congress provided for miner participation in the inspection process.[4] Thus, § 103(f) of the Act confers "walkaround rights" on designated representatives of the miners:

> Subject to regulations issued by the Secretary, . . . a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f). Miners' representatives may also participate in other procedures designed to address health and safety concerns.[5]

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[4] *See* 123 CONG.REC. S20,019 (1977) (comments of Senator Javits).

[5] A miners' representative may, for example, request and obtain an "immediate inspection" by the Secretary when the

The Act contemplates non-employee third parties serving as "miners' representatives." The statute provides only that the representative must be "authorized by his miners" and that any "representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection. . . . " *Id.* By regulation, however, the Secretary has defined "miners' representative" to include "[a]ny person or organization which represents two or more miners . . . for the purposes of the Act. . . . " 30 C.F.R. § 40.1(b)(1) (1993).

Of significance here, the regulations also provide that after receiving notice that two or more miners have appointed a representative, the mine operator is required to post the designation on the mine's bulletin board. *Id.* § 40.4. Under the Act, if the mine operator violates statutory or regulatory requirements, the Secretary shall issue a citation and may recommend civil penalties of up to $50,000. 30 U.S.C. §§ 814(a), 815(a), 820(a) (1988 & Supp. IV 1992). If the mine operator fails to abate the violation within the deadline set by the Secretary, the Secretary may fine the operator up to $5,000 per day that the violation continues. *Id.* § 820(b). The Secretary acted

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representative "has reasonable grounds to believe that a violation of [the Act] or a mandatory health or safety standard exists, or an imminent danger exists. . . . " 30 U.S.C. § 813(g)(1). Miners' representatives may also have access to confidential safety-related documents (such as the roof control plan and mine map) and may take part in hearings, appeals, and disciplinary proceedings involving the mine. *See, e.g., id.* §§ 811(c), 813(g)(2), 815(d), 821, 862(a), 872(b).

under this provision of the Act in issuing the citation challenged in the instant appeal.

Kerr-McGee owns and operates the Jacobs Ranch Mine, a non-unionized surface coal mine in Campbell County, Wyoming. In July, 1990, seven miners employed at the mine designated the United Mine Workers of America ("UMWA") and two of its employees as their miners' representative. Prior to the designation of the UMWA, there had never been a miners' representative at the Jacobs Ranch Mine. The parties agree that one of the UMWA miners' representatives had relocated to Wyoming "for the purpose of unionizing the coal miners in the Powder River Basin, including the miners at the Jacobs Ranch Mine."

The UMWA subsequently mailed copies of the designation form to the Jacobs Ranch Mine and to the Mine Safety and Health Administration ("MSHA") office in Denver, Colorado.[6] Kerr-McGee officials at the mine decided not to post the designation form. After receiving a complaint that Kerr-McGee had violated 30 C.F.R. § 40.4 by failing to post the form,[7] a MSHA coal mine inspector visited the mine and showed a copy of the complaint to the Manager of Administration. When the Jacobs Ranch

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[6] All miners' representatives must file with MSHA identifying information (such as the representative's name and address) as well as a document which "evidences the designation of the representative of miners." 30 C.F.R. § 40.3.

[7] 30 C.F.R. § 40.4 provides: "A copy of the information provided the operator pursuant to 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status."

Mine repeated its unwillingness to post the form, the inspector issued a citation under 30 U.S.C. § 814(a).[8] Kerr-McGee refused to comply with the abatement order, and the inspector issued an order for failure to abate the citation, which Kerr-McGee contested to the Commission.

Before a Commission administrative law judge ("ALJ"), Kerr-McGee argued that neither the Act nor the regulations required it to recognize the UMWA as a miners' representative because the UMWA was neither a Jacobs Ranch Mine employee nor an official collective bargaining representative at the mine. The ALJ disagreed, finding that Kerr-McGee had violated 30 C.F.R. § 40.4 by refusing to post the designation-of-miners form. *Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety and Health Review Admin.*, 13 F.M.S.H.R.C. 1889 (1990). The ALJ ruled that, consistent with *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir.1990), absent a showing of abuse, the Act and regulations place no restrictions on who may act as a miners' representative. 13 F.M.S.H.R.C. at 1903-05. As a result, the fact that the UMWA was not a collective bargaining agent of the Jacobs Ranch miners did not prevent it from acting as a miners' representative for purposes of the Act. Further, the ALJ rejected Kerr-McGee's argument that, given the UMWA's intent to unionize the mine, its use of the miners' representative designation constitutes *per se* abuse of

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[8] "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator . . . has violated this chapter, or any . . . regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator." *Id.*

the rights and privileges accorded safety representatives under the Act. The ALJ suggested that an abuse of the Act would occur if, after entering mine property in its role as a miners' representative, the UMWA "infiltrat[ed] working areas to enlist members, distribute literature, purloin confidential . . . records, etc." *Id.* at 1905. Absent proof of such individual instances of abuse, however, the UMWA could act as a miners' representative. The Commission affirmed the ALJ's decision in all respects. *Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin.*, 15 F.M.S.H.R.C. 352 (1993).

II.

Kerr-McGee contends that the Commission acted arbitrarily and unreasonably in adopting the Secretary's position that the Act and regulations allow non-elected labor unions to act as miners' representatives. The UMWA cannot qualify as a miners' representative at the Jacobs Ranch Mine, Kerr-McGee maintains, because the Act and its legislative history contemplate direct involvement by *miners*, not unions, and the UMWA would use its designation to further its organizational goals rather than the safety objectives embodied in the Act. In addition, Kerr-McGee maintains, the Secretary's interpretation creates unnecessary conflicts between the Act and Kerr-McGee's basic property rights to keep union organizers off of its property and out of its records. Hence, Kerr-McGee argues that even if the Act and regulations would otherwise allow the UMWA designation, the Supreme Court's opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992), required the Secretary to balance Kerr-McGee's property interests against

the safety objectives of the Act; such balancing, Kerr-McGee concludes, would compel a prohibition against non-elected third parties serving as miners' representatives for purposes of the Act.

In reviewing the Commission's determination that the Secretary reasonably interpreted the Act and regulations as allowing third parties to act as miners' representatives, the court applies the deferential standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Since the Act does not expressly address whether a non-elected labor organization can serve as a miners' representative at a non-unionized mine, the only issue is whether the Secretary and Commission adopted "a permissible construction of the statute." *Id.* at 843, 104 S.Ct. at 2782. This issue involves an interpretation not only of the statute itself, but of the regulations promulgated by the Secretary and hence the Secretary's interpretation deserves even greater deference and "will be accepted unless plainly wrong." *General Carbon Co. v. Occupational Safety and Health Review Comm'n*, 860 F.2d 479, 483 (D.C.Cir.1988); *see also Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C.Cir.1990). The Commission's construction, in turn, will stand so long as it is " 'reasonably defensible.' " *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C.Cir.1988) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781). "The respect due to [the Commission] is heightened" where, as here, the Secretary agrees with the Commission's determination. *Emerald Mines Co. v. Federal Mine Safety and Health Review Comm'n*, 863 F.2d 51, 53 (D.C.Cir.1988).

A.

The Secretary has defined "representative of miners" to include "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act. . . . " 30 C.F.R. § 40.1. The definition, by specifically including "organizations," appears to contemplate that labor unions may serve as miners' representatives. As the Secretary points out, the Preamble to the Part 40 regulations expressly considers and rejects the notion that miners' representatives must be selected by a majority of miners. 43 Fed.Reg. 29508 (July 7, 1978). As a result, an "organization" that represents less than 50% of the miners may act as a miners' representative under the Secretary's regulations. The Secretary's interpretation, then, does not appear inconsistent with the regulations or [sic] plainly wrong. *General Carbon Co.*, 860 F.2d at 483.

However, Kerr-McGee contends that the Act contemplates participation by Jacobs Ranch Mine *employees*, not outside representatives, and that allowing the UMWA designation would undermine the safety objectives of the Act. Although conceding that unions that have collective bargaining responsibility under the NLRA may act as miners' representatives,[9] Kerr-McGee would bar all other third parties from filling the miners' representative role. Yet nothing in the Act or its legislative history lends

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[9] Amici contest even this proposition, arguing that third parties cannot, under any circumstances, act as miners' representatives under the Act. "[A]t most," amici argue, § 103(f) grants a right to non-employee miners' representatives who are otherwise rightfully on the mine to accompany the inspector during the physical inspection of the mine.

support to Kerr-McGee's challenge to the Secretary's interpretation of the Act.

Although the Act refers to miners' representatives in a number of contexts, the only relevant discussion of the term appears in § 103(f), which provides:

> **Participation of representatives of operators and miners in inspections**
>
> Subject to regulations issued by the Secretary, . . . a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine. . . . *Such representative of miners who is also an employee of the operator* shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [The Secretary may also admit] additional representatives. However, only one such representative of miners *who is an employee of the operator* shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

30 U.S.C. § 813(f) (emphasis added). This provision does not expressly bar non-employees from serving as miners' representatives; indeed, it appears to contemplate that miners may designate third parties to represent them for purposes of the Act. As the Tenth Circuit reasoned in *Utah Power & Light*, "[b]y creating a subclass of representatives who are entitled to compensation while exercising walkaround rights under § 103(f), Congress clearly recognized that some miners' representatives may be employees of the operator and some may not." 897 F.2d at 450. Although *Utah Power & Light*, unlike the instant case,

involved a unionized mine, the Tenth Circuit concluded that § 103(f) "confers upon the miners the right to authorize a representative for walkaround purposes *without any limitation* on the employment status of the representative." *Id.* Its conclusion is consistent with the view of this court in *Council of Southern Mountains v. Federal Mine Safety and Health Review Comm'n*, 751 F.2d 1418, 1421 (D.C.Cir.1985), that the Act "merely refers to 'representatives' and does not articulate any distinction between the rights of employee and nonemployee representatives." Given the language of § 103(f), and in the absence of a statutory definition or other limitation on the meaning of "miners' representative," the conclusion that the Act does not preclude non-elected unions from acting as miners' representatives is reasonable.

Kerr-McGee's contrary construction fares no better upon review of the legislative history of the Act. The legislative history shown that Congress considered miner education and participation important goals of the Act, but it does not suggest that Congress viewed third-party participation in mine safety issues as incompatible with those objectives. For example, although one colloquy between two Senators mentioned only miners (and not third parties) in the context of walkaround rights, the debate focused on whether mine employees who participated in safety inspections should receive compensation and not on the general question of whether nonemployees could act as miners' representatives. *See* 123 CONG.REC. S20,019-20 (1977); *Utah Power & Light*, 897 F.2d at 451. The legislative history of the 1969 Act, the predecessor to the 1977 Act, further confirms that Congress did

not intend to bar non-elected organizations from acting as miners' representatives.[10]

Obviously, if Congress had intended to restrict the meaning of "miners' representatives" in the 1977 Act, it could have done so in the statute or at least mentioned its views in the legislative history. It did neither. Consequently, in view of Congress' clear concern about miners' safety, the Secretary's broad interpretation of the term is consistent with congressional objectives.[11] As the Secretary points out, and as the Tenth Circuit observed in *Utah Power & Light*, third-party representatives can often contribute to an inspection in ways that miners themselves cannot. Non-employees may, for example, provide valuable safety and health expertise, use their knowledge of other mines to spot problems and suggest solutions, and take actions without the threat of pressure from the employer. 897 F.2d at 451-52. The involvement of third

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[10] The Conference Report accompanying the 1969 Act stated that "as used . . . throughout the Act, the term 'representative of the miners' includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws." H.R CONF.REP. No. 761, 91st Cong., 1st Sess. 67 (1969), U.S. Code Cong. & Admin.News 1969, pp. 2503, 2583. Although the 1969 Act defined the role of miners' representatives somewhat differently than the 1977 Act, it provided for walkaround rights, the right to call for inspections, and other privileges available under the current law. *See, e.g.*, 1969 Act section 103(h), 83 Stat. 742, 750 (1969).

[11] Although Kerr-McGee does not emphasize the point, we note it is the regulations that allow for "[a]ny person or *organization*" to serve as a miners' representative. The statute, 30 U.S.C. § 813(f), refers only to "representatives" of miners generally.

parties in mine safety issues therefore is consistent with Congress's legislative objectives of improving minor health and mine safety. While Kerr-McGee's argument that the Secretary's categorical reading of the statute and regulations could lead to anomalous results wholly apart from conflict with the NLRA – whereby a competitor or customer is designated a "miners' representative" – has intuitive appeal, we do not read the Commission's decision to imply that it would necessarily treat such "horribles" the same way as the "miners' representatives" who are challenged in this appeal.

B.

Kerr-McGee relies on *Utah Power & Light*, which recognizes that in some circumstances "walkaround rights may be abused by nonemployee representatives," 897 F.2d at 452, to argue that the UMWA's use of the miners' representative designation for organizing purposes constitutes *per se* abuse under the Act. The Commission could reasonably reject this view. As proposed by Kerr-McGee, a third party's motive would determine whether it could serve as a miners' representative, and presumably, if any objective other than miner safety inspired the decision to seek miners' representative status, the third party would be disqualified from representing the miners. But, as the Tenth Circuit pointed out in rejecting any such automatic presumption of abuse, "the potential for abuse does not require a construction of the Act that would exclude non-employee representatives from exercising walkaround rights altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them." *Id.* The ALJ in the instant

case made clear that the UMWA could abuse its rights by "either 'outside' or fifth-column type infiltration of working areas to enlist members, distribute literature, purloin confidential [Jacobs Ranch Mine] records, etc., under the facade of Mine Act participation." 13 F.M.S.H.R.C. at 1905. If the Secretary found evidence that a union had actually misused the authority granted by the Act, the union would lose its right to serve as a miners' representative.[12]

In light of the Act's objectives – to improve safety and health in the mines and to increase miner awareness of safety and health issues – this interpretation appears reasonable The motivations of a miners' representative are irrelevant so long as the representative, through its actions, does not abuse its designation and serves the objectives of the Act. Indeed, the instant case illustrates that third parties can further the Act's goals of miner education and safety awareness.[13] The fact that the

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[12] Although the Secretary's regulations do not specify a procedure for disqualifying a miners' representative for abusive behavior, the mine operator could obtain relief by following the course taken in the case: refusing to post the representative's designation and denying access to the mine. The Secretary, exercising prosecutorial discretion, could then decide whether the union had abused its authority and relinquished the right to serve as miners' representative.

[13] Before the UMWA designation, the miners at Jacobs Ranch Mine had never selected a miners' representative. The record shows that the UMWA has offered educational sessions to discuss safety issues and inform miners of their health and safety rights. Other non-employee, non-elected groups have offered similar services to improve mine safety and miner health. *See Council of Southern Mountains*, 751 F.2d at 1421

UMWA may seek to gain legitimacy and credibility among the Jacobs Ranch miners by educating ad assisting them with health and safety issues does not suggest a reason to prevent its participation in the first instance.[14] Since Kerr-McGee has offered no evidence that the UMWA's designation contravenes the safety goals of the Act, the Commission could reasonably reject the position that a union's organizational motives constitute an abuse of the miners' representative designation.

C.

Finally, Kerr-McGee's reliance on *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992), as requiring the Secretary to balance Kerr-McGee's property interests against the safety interests of the Act in deciding whether the UMWA could serve as the miners' representative, is misplaced. In *Lechmere*, the Supreme Court held that § 7 of the NLRA does not give non-employee organizers the right to enter in employer's property for organizational purposes except when access to employees outside the employer's property is "infeasible." 502 U.S. at ___, 112 S.Ct. at 848. For several reasons, *Lechmere* did not require the Commission to balance the union and property interests here.

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(miners' representative was "a grass-roots citizen's organization which, since 1913, has worked to improve health and safety conditions in the Appalachian coal mines").

[14] The ALJ found that Kerr-McGee "at best showed [that the] UMWA used [the] Part 40 [regulations] as a 'tool' to create employee interest and to enhance its standing." 13 F.M.S.H.R.C. at 1907.

First, *Lechmere* concerned the NLRA, under which the union's right to contact employees is derivative of the employees' own organizational rights. The Court considered it important that the NLRA "confers rights only on *employees*, not on unions or their nonemployee organizers." *Id.* at ___, 112 S.Ct. at 845.[15] As a result, the Court refused to impede the employer's property rights unless absolutely necessary to ensure protection of the employees' organizational interests. Thus, the Court held that the "exception" to the employer's right to exclude unions from its property "was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society." *Id.* at ___, 112 S.Ct. at 849.

By contrast, the Act defines the rights of miners' representatives and specifies the level of intrusion on private property interests necessary to advance the safety objectives of the Act. The miners' representative designation "does not convey an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants." *Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, ___, 114 S.Ct. 771, 781, 127 L.Ed.2d 29 (1994). Instead, the Act specifies particular areas, all related to miner safety and health, in which Congress has deemed

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[15] *See also National Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956) (although "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline, . . . no such obligation is owed non-employee organizers").

the participation of miners' representatives appropriate. Because Congress, rather than the agency, has conducted the balancing, the *Lechmere* standard is inapplicable.

Second, in *Lechmere*, the agency's discretion was limited by a prior Supreme Court decision that had interpreted the statute at issue. ___ U.S. at ___, ___, 112 S.Ct. at 847-48; *see also id.* at ___, 112 S.Ct. at 852 (White, J., dissenting). The Supreme Court has not addressed the issue of whether third parties may serve as miners' representatives under the Act,[16] and therefore it has not precluded the interpretation adopted by the Secretary. In the absence of contrary Supreme Court precedent, the court must accept the Secretary's interpretation so long as it is "permissible." *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781.

Finally, Kerr-McGee attempts to recharacterize the property interests at issue in *Lechmere* as statutory NLRA objectives that the Commission must accommodate in implementing the Act. But, as the Supreme Court pointed out in *Thunder Basin*, "[t]he right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it." ___ U.S. at ___ n. 21, 114 S.Ct. at 781 n. 21. By allowing non-elected unions to serve as miners' representatives, the Secretary has not disregarded any "other and equally important Congressional objectives" under the

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[16] Indeed, in *Thunder Basin*, involving the regulations at issue here, the Supreme Court noted in dictum that "Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators." ___ U.S. at ___ n. 21, 114 S.Ct. at 781 n. 21.

NLRA. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47-49, 62 S.Ct. 886, 894-896, 86 L.Ed. 1246 (1942). NLRA policies therefore do not weigh against the Secretary's construction.

Accordingly, we deny the petition.[17]

SENTELLE, Circuit Judge, concurring:

I agree with the majority's analysis and conclusion. I write separately only to emphasize what I understand the court *not* to be deciding. That is, I understand the court to be deciding only that the Secretary has permissibly interpreted the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.* (1988), to permit the selection by two or more miners of private persons not employed by the mine as representatives for the purpose of "accompany[ing] the Secretary or his authorized representative during the physical inspection" of the mine and participating in related conferences. 30 U.S.C. § 813(f).

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[17] Kerr-McGee's contention that the Commission erred in concluding that the ALJ did not abuse his discretion in denying the motion to reopen the record based on newly discovered evidence is without merit. Kerr-McGee concedes that a motion to reopen is justified only when the new evidence would affect the outcome of the case. *See Friends of the River v. FERC*, 720 F.2d 93, 98 n. 6 (D.C.Cir. 1983). The ALJ could reasonably conclude that consideration of Kerr-McGee's new evidence would not change the result in the instant case. The new documents establish, at most, that the UMWA plans to use its miners' representative status to gain credibility among miners in the Powder River Basin and thus further its organizational goals. The documents show no intent by the UMWA to conduct organizing activities on mine property or to misuse the information to which it is entitled under the Act.

The court does not decide whether the statute as construed is constitutional.

I agree with my colleagues that we need not decide the constitutional question. "A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 1323, 99 L.Ed.2d 534 (1988) (citations omitted). Nonetheless, I wish to highlight the fact that we are not determining constitutionality because I believe there is a question of constitutional dimension lurking behind today's decision – a question based on the same constitutional presumptions that I believe underlie *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841 117 L.Ed.2d 79 (1992). That is, it is fundamental to our constitutional system of limited government that no person can "be deprived of . . . property, without due process of law. . . . " U.S. Const. amend. V. Whatever else is encompassed within the right of "property" protected by the Fifth Amendment, the right to exclude unwarranted intrusions is fundamental *See, e.g., Lloyd Corp. v. Tanner*, 407 U.S. 551, 567, 92 S.Ct. 2219, 2228, 33 L.Ed.2d 131 (1972).

To say that the Congress can constitutionally pass laws permitting inspections of mine premises is one thing; to say that it can compel mine owners to permit onto their premises private individuals whose only claim to presence is selection by two of the property owners' employees is quite another. I dare say that the very attorneys representing the plaintiffs in this case would think their constitutional rights ill used if a legislative body were to require them to permit into their offices, file

rooms, and conference areas anyone whom two of their secretaries, messengers, or paralegals chose to invite. Likewise the miners themselves would probably not be happy with a statute providing that any two private persons who lawfully entered their homes could thereafter lawfully invite anyone else they chose to make the same intrusion.

It may well be that the statute in its present form and with its present interpretation is constitutional; but it may not. The parties have not raised that question. I hope that future litigants will not cite this case for the proposition that the statute is constitutional if in some later case that issue is presented.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 4, 1993

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| KERR-McGEE COAL CORPORATION | : | Docket Nos. |
| | : | WEST 91-84-R |
| v. | : | WEST 91-85-R |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | WEST 91-220 |

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), and presents the issue of whether miners may choose as their representative for "walkaround" purposes under section 103(f) of the Mine Act,[1] a union, or the

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[1] The term "walkaround" is used in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides in pertinent part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized

agent of a union, that is not the miners' collective bargaining representative under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (as amended) (1988) ("NLRA"). This case arose when an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Kerr-McGee Coal Corporation ("Kerr-McGee") a citation alleging that Kerr-McGee had violated 30 C.F.R. § 40.4 when it failed to post at its Jacobs Ranch Mine, a nonunion mine, the names of certain miners' representatives not employed by Kerr-McGee. These individuals were agents of the United Mine Workers of America ("UMWA") and were designated as miners' representatives by certain miners employed at the Jacobs Ranch Mine.[2] The inspector subsequently issued an order of withdrawal pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), after Kerr-McGee declined to abate the alleged violation.

Following an evidentiary hearing, Administrative Law Judge Michael A. Lasher, Jr., upheld the citation and order. 13 FMSHRC 1889 (December 1991) (ALJ). The

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representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conference held at the mine. . . .

30 U.S.C. § 813(f).

[2] The regulations of the Secretary of Labor dealing with miners' representatives are contained at 30 C.F.R. Part 40. Section 40.4, entitled "Posting at mine," provides:

> A copy of the information provided the operator pursuant to § 40.3 of this part [designating the miners' representative] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

judge concluded that, although the UMWA did not represent the miners at the Jacobs Ranch Mine for collective bargaining purposes under the NLRA, the designation of nonemployee UMWA agents as miners' representatives did not constitute a "per se" abuse of the miners' representative process under the Mine Act and the Secretary's implementing regulations at 30 C.F.R. Part 40 ("Part 40"). For the reasons discussed below, we affirm.

## I.
## Factual and Procedural Background

### A. Factual Background

Kerr-McGee owns and operates the Jacobs Ranch Mine, a surface coal mine employing approximately 270 miners and located in the Powder River Basin near Gillette, Wyoming. The employees at the mine have never been unionized. Dallas Wolf, an organizer for the UMWA, moved to Gillette in April 1990, for the purpose of unionizing miners in the Powder River Basin, including the Jacobs Ranch miners.

The UMWA held several meetings in Gillette that were organized by Wolf and attended by a number of Kerr-McGee miners. In July 1990, the UMWA also sponsored several days of safety training for Kerr-McGee miners. These training sessions were presented by Robert Butero, a UMWA safety and health representative. At the end of the training sessions, Wolf urged those in attendance to sign forms designating Wolf and Butero as their

miners' representatives under Part 40.[3] Seven of the Jacobs Ranch miners designated Wolf and Butero as their miners' representatives and themselves as alternate representatives.[4] The record reflects that neither Wolf nor Butero actually acted in his capacity as miners' representative at the Jacobs Ranch Mine.

Under 30 C.F.R. § 40.3, miners' representatives are required to file with MSHA information regarding their designation and identity and to provide copies to the affected operator. Wolf mailed the miners' representative designation form to the MSHA District Office in Denver and its receipt was acknowledged. Kerr-McGee received its copy of the form and decided that it would not post the designation of Wolf and Butero at the mine pursuant to section 40.4 (n.2 *supra*), because it believed that it was not required to accept agents of the UMWA as miners' representatives. Kerr-McGee did not inform MSHA of its decision not to post the designation.

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[3] The Secretary's regulation defines the term "representative of miners" as "[a]ny person or organization which represents two or more miners at a . . . mine for the purposes of the Act." It equates the term to "[r]epresentatives authorized by the miners, miners or their representative, authorized miner representative," and other similar terms used in the Act. 30 C.F.R. § 40.1(b)(1) & (2). Thus, under Part 40, any two miners at a mine may designate "any person or organization" to represent them as a miners' representative.

[4] Prior to this designation, there had never been a miners' representative designated under Part 40 at the mine. Since this designation, approximately 92 Jacobs Ranch miners have been designated as Part 40 representatives. S. Br. at 18-19 n.9.

MSHA Inspector Jimmie Giles inspected the Jacobs Ranch Mine on October 25, 1990, in response to a complaint submitted to MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g), that the miners' representative designation form had not been posted at the mine. Ron Crispin, Kerr-McGee's manager of administration, informed Inspector Giles that the designation form was not, and would not be, posted. Crispin read to Inspector Giles a prepared statement that Kerr-McGee was not required to accept the designation of non-employees as miners' representatives.[5]

Inspector Giles issued Kerr-McGee a citation alleging a violation of section 40.4, for failure to post the designation form on the mine bulletin board. and allowed Kerr-McGee 15 minutes to abate the condition by posting the form. After Crispin again declined to post the designation form, Inspector Giles issued an order of withdrawal pursuant to section 104(b) of the Act. 30 U.S.C. § 814(b), for refusal to abate the alleged violation. Kerr-McGee finally abated the citation after receiving a letter from the MSHA district manager stating that Kerr-McGee would be assessed a daily penalty (*see* 30 U.S.C. § 820(b)) if it did

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[5] The statement provides:

> Kerr-McGee does not believe it can lawfully be required to accept the designation of a non-employee walkaround representative at the Jacobs Ranch Mine or to recognize any other action by a non-employee. MSHA Inspectors are entitled to, and encouraged to, talk to Jacobs Ranch employees as a part of all inspections. Inspections should proceed on that basis without outside interference.

Exh. C. to Stipulation, Exh. M-7.

not immediately abate the violative condition. Kerr-McGee filed timely notices of contest of the citation and the order, and the matter proceeded to an evidentiary hearing before Judge Lasher.

B. Procedural Background

Following the hearing, and before submission of the parties' post-hearing briefs, Kerr-McGee moved to reopen the record based upon newly discovered evidence. Kerr-McGee asserted that, in an unrelated proceeding after the hearing, its counsel had obtained from the UMWA several documents establishing that certain statements made by Wolf in his pre-hearing deposition in this matter were incorrect. Wolf had testified in his deposition that he did not have any letters or written reports regarding this case or his designation as a miners' representative. Kerr-McGee offered, as its newly discovered evidence, a series of internal UMWA memoranda to and from Wolf, which, it asserted, revealed that Wolf had been designated as a walkaround representative in order to facilitate on-going UMWA organizing activities.

In an unpublished order, the judge denied Kerr-McGee's motion to reopen. The judge stated that the prerequisites for reopening a record for the presentation of newly discovered evidence are:

> the evidence [is] discovered after the completion of the trial; due diligence on the part of the moving party to discover the new evidence prior to trial is shown or inferred; the evidence is not merely cumulative or impeaching; the evidence is material; and the evidence is such

> that a new trial would probably produce a new result.

Unpublished Order at 2 (October 11, 1991) (citation omitted) ("Order"). The judge determined that Kerr-McGee did not establish that it had exercised due diligence to discover the documents prior to trial. The judge next determined that the evidence was largely cumulative, and that a number of the documents had been discovered prior to trial and were either accepted into evidence or dismissed by the judge as irrelevant. The judge also noted that the veracity of Wolf's deposition testimony was a matter for impeachment and, as such, was not a sufficient basis for reopening the case. Finally, the judge rejected Kerr-McGee's argument that the newly discovered evidence would probably produce a different result. The judge explained that the documents merely revealed that union organizing activity was taking place in the Powder River Basin, and that this was established and undisputed at trial. Order at 2-3.

In his decision on the merits, the judge concluded that the designation of Wolf and Butero as miners' representatives at the Jacobs Ranch Mine did not constitute a per se abuse of the miners' representative process, and that Kerr-McGee's refusal to post the designation was not justified. The judge first determined, upon examination of Part 40 and section 103(f) of the Mine Act, that a union may represent miners for walkaround and other Mine Act purposes even though it is not the collective bargaining representative of those miners under the NLRA. 13 FMSHRC at 1901. The judge pointed out that the language of section 40.1(b) (n.3 *supra*) expressly provides that a "representative of miners" includes "*any* individual

or organization" that represents two or more miners, and does not set forth any restriction or qualification that the representative must be recognized as such under other labor laws. *Id.* (emphasis added). The judge relied on *Utah Power & Light Co. v. Secretary*, 897 F.2d 447 (10th Cir. 1990) ("*UP&L*"), *aff'g, Emery Mining Corp.*, 10 FMSHRC 276 (March 1988), in which the United States Court of Appeals for the Tenth Circuit, affirming the Commission, held that walkaround rights may be extended to miners' representatives who are not employees of the affected operator. *Id.*

The judge further determined that a conflict did not exist between the Mine Act and the NLRA. The judge reasoned that the representative process has distinct meanings and purposes under each Act. 13 FMSHRC at 1902. He explained that under the NLRA, a representative is elected by a majority of workers for a broad range of collective bargaining purposes. In contrast, under the Mine Act and the Secretary's Part 40 regulations, a representative is chosen by two or more miners for the primary purpose of accompanying a mine inspector during an inspection. *Id.*

The judge also noted that MSHA has consistently interpreted the term "representative" in the Mine Act and Part 40 as any person qualified to be on a mine site, regardless of whether that person is an employee of the mine operator or a member of a labor or other organization. 13 FMSHRC at 1903. Finally, the judge observed that *UP&L* had clearly indicated that the Secretary and an affected operator could take appropriate action against any miners' representative who abuses the walkaround process by engaging in inappropriate activities, such as

union organizing, during walkaround. 13 FMSHRC at 1904-05, *citing UP&L*, 897 F.2d at 452. The judge held that instances of abuse must be considered on a case-by-case basis. The judge concluded that the exercise of Mine Act rights by Kerr-McGee employees to designate non-employee UMWA members as their representatives was not an abuse of the miners' representative process. 13 FMSHRC at 1905. The judge determined that "at best [Kerr-McGee] showed [that the] UMWA used Part 40 as a 'tool' to create employee interest and to enhance its standing." 13 FMSHRC at 1898 n.7. Accordingly, the judge denied Kerr-McGee's contests of the citation and order, and assessed a civil penalty of $300. 13 FMSHRC at 1906.

The Commission subsequently granted Kerr-McGee's petition for discretionary review, which challenges the judge's decision on the merits and his denial of the motion to reopen. The American Mining Congress, the National Coal Association and the Wyoming Mining Association (collectively, "industry amici"), jointly, and the UMWA, separately, filed amicus curiae briefs in this proceeding, and the Commission heard oral argument.

## II.

## Disposition of Issues

### A. Motion to Reopen

Kerr-McGee argues that the judge erred in denying its motion to reopen the record. We disagree.

Although the Commission's procedural rules, 29 C.F.R. Part 2700, do not specifically address motions to

reopen a hearing on the basis of newly discovered evidence, Commission Procedural Rule 54(a), 29 C.F.R. § 2700.54(a), authorizes Commission judges to regulate the course of hearings and to dispose of procedural motions. The Commission also may properly look for guidance to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") (29 C.F.R. § 2700.1 (b)), and precedent thereunder. A motion to reopen the record to submit new evidence is not expressly addressed in the federal rules but, rather, is committed to the sound discretion of the trial judge. *See generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). In general, an abuse of discretion occurs when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for its ruling. *See, e.g., In re Coordinated Pretrial Proceedings, etc.*, 669 F.2d 620, 623 (10th Cir. 1982).

A motion for a new trial under Fed. R. Civ. P. 59 ("Rule 59") has certain similarities and affords some guidance. *See* J. Moore, J. Lucas & G. Grother, 6A *Moore's Federal Practice* ¶ 59.04[13] (2d ed. 1992) ("Moore's"). A motion to reopen, however, seeks to offer additional evidence before a decision has been rendered and, consequently, the standards for granting such a motion are less stringent than those for a motion seeking a new trial.[6] Generally, in determining whether to grant a motion to reopen, it is appropriate to consider the time when the motion is made, the character of the additional evidence,

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[6] The stricter criteria for a Rule 59 post-judgment motion are the ones cited by the judge in his pre-trial order.

and the effect of granting the motion. 6A *Moore's* at ¶ 59.04[13].

The judge applied the post-judgment Rule 59 criteria, urged upon him by Kerr-McGee, and did not expressly refer to the less stringent pre-judgment test. In applying the somewhat similar Rule 59 criteria, however, the judge, in effect, considered the essential factors of the pre-judgment test. Of particular importance, the judge characterized the "new" evidence as cumulative, and noted that a number of the allegedly newly found documents had been discovered prior to trial and rejected at trial as irrelevant. Order at 2. The judge also determined that admission of the evidence would not have altered his findings in any event. Order at 3. He explained that the evidence merely demonstrated that union organizing activity was taking place in the Powder River Basin, which had been established at trial and was not disputed. *Id.* Under the circumstances, any error in setting forth the stricter Rule 59 criteria was harmless.

Because a rational basis existed for the judge's denial of Kerr-McGee's motion to reopen, and the judge's error, if any, was harmless, we conclude that the judge did not abuse his discretion. Accordingly, we affirm his order denying the operator's motion to reopen the record.

B. Designation of Wolf and Butero as Miners' Representatives

1. Contentions of the parties on review

The thrust of the operators'[7] argument is that the Mine Act should be construed to prohibit a union or a union member from being designated as a "representative of miners," unless that union also represents the miners under the NLRA. The operators assert that granting representative status to a nonemployee union agent infringes upon an operator's right to control access to its private property by nonemployees, including nonemployee union organizers. In support, the operators rely heavily on *Lechmere, Inc. v. NLRB*, 502 U.S. ___, 117 L.Ed.2d 79 (1992).

Kerr-McGee distinguishes *UP&L*, 897 F.2d 447, on the grounds that, in that case, the nonemployee miners' representative was a union member who sought to act as a representative at a union mine, whereas the present case involves a nonunion mine. Thus, Kerr-McGee asserts that *UP&L* is not controlling.

According to the operators, the Secretary's Part 40 Regulations and, in particular, the definition of "representative of miners," are legally infirm. The operators assert that the Part 40 definition of representative, which allows for multiple representation by "any" individuals

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[7] Unless otherwise noted, the arguments of industry amici are included in our discussion of Kerr-McGee's position and the term "operators" is used in reference to their arguments. Similarly, the arguments of amicus UMWA are incorporated in our discussion of the Secretary's position.

or organizations, conflicts with provisions of the NLRA that prohibit a unionized employer from dealing with any agent other than the official collective bargaining agent. They argue that permitting a union member to act as a miners' representative at a nonunion mine not only intrudes upon the operator's right under the NLRA to control access to its private property by union organizers but also tends to create a favorable impression among the miners towards the union. The operators contend that the Secretary's interpretation of Part 40 is unreasonable and that to permit the kind of representation involved here amounts to a failure to accommodate Part 40 to the NLRA's regulatory scheme.

The operators contend that the designation of a union agent as a walkaround representative at a non-union mine constitutes an abuse of section 103(f), even under *UP&L*. because it is plainly for an ulterior purpose. Kerr-McGee urges that the aim of designating UMWA representatives here was to foster their organizing efforts rather than to promote health and safety and, consequently, that aim was abusive of the Mine Act.

The Secretary responds that the operators' suggested approach to the miners' representative process is overly restrictive under the Mine Act and the Part 40 implementing regulations. The Secretary notes that nothing in Part 40 prohibits the Kerr-McGee miners from designating an agent of the UMWA or any labor union as their miners' representative under the Mine Act, even though the designated union is not the miners' collective bargaining representative under the NLRA. The Secretary emphasizes that section 103(f) of the Mine Act imposes no status limitations on who may serve as a miners' representative,

and, accordingly, Part 40 regulations simply mirror the statute's broad approach.

The Secretary urges that deference should be given to his interpretation of the Mine Act and to his interpretation of the regulations that he has adopted. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). The Secretary asserts that his interpretation of the relevant portions of Part 40 should be accepted, as it is reasonable, consistent with the Mine Act, and is supported by his "contemporaneous construction" of Part 40, published at the time Part 40 was promulgated. The preamble to the regulations specifically discussed and rejected the definition of "representative" as used in the NLRA, explaining that the purposes of the representation process under the two statutes were different.[8]

The Secretary further contends that *UP&L*, 897 F.2d 447, is dispositive. There, the Tenth Circuit held that

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[8] The preamble to Part 40 states:

> [T]he NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representative in the context of collective bargaining. The meaning of the word representative under this [A]ct is completely different. Additionally the rights of nonunion miners would be severely limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only any one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated.

43 Fed. Reg. 29508 (July 7, 1978).

nonemployees may serve as walkaround representatives. Under *UP&L*, an operator may take appropriate action against a designated representative only if he engages in specific conduct unrelated to safety or health. The Secretary contends that, as the judge found, Kerr-McGee has failed to show instances of such abusive conduct. The Secretary acknowledges that there was a union organizing campaign underway at the Jacobs Ranch Mine, but argues that, as shown by the record, the designation of the UMWA representatives was also intended to advance miners' safety. Thus, even if the miners' representatives possessed a "mixed motive," i.e., safety and unionizing, there was no abuse of the walkaround function.

Finally, the Secretary argues that the Part 40 regulations do not impermissibly conflict with the NLRA. The Part 40 regulations do not impinge on Kerr-McGee's right under the NLRA to deny access to its property to nonemployees engaged in union organizing because the miners' representative has only a limited access, a carefully delineated right to assist with inspections, and may not use that access to engage in organizing activities.

2. Analysis

We find the judge's reasoning persuasive and conclude that this matter is controlled by the decisions of this Commission and the Tenth Circuit in the *UP&L* litigation. The general issue of whether an operator's miners may designate an individual who is not an employee of the mine operator as their miners' representative for walkaround purposes has been previously determined by the Commission. In *Emery*, the Commission held that "as a

matter of statutory right a nonemployee may be chosen by the miners of a given mine as their representative and . . . such a representative may properly be afforded the opportunity to participate in walkaround at that mine – although without compensation from the operator." *Emery*, 10 FMSHRC at 284-85, *aff'd*, *UP&L*, 897 F.2d at 449-52. The Commission's conclusion in *Emery* was based on the language of section 103(f) of the Mine Act, which "imposes no employee-status limitation as to whom [miners] may choose [as their own representative]." 10 FMSHRC at 284. The Commission determined that the Secretary's Part 40 regulations' "broad definition of representative is in accord with the underlying statutory text [of section 103(f)]." 10 FMSHRC at 285.

In affirming the Commission's holding on this issue, the Tenth Circuit concluded that the Secretary's and the Commission's interpretation of section 103(f) was "both reasonable and supportable" and held that miners may authorize nonemployees to act as their representative under § 103(f) of the Act. 897 F.2d at 452. In reaching this conclusion, the Court determined that the underlying purpose of section 103(f) "can be furthered by allowing both employees and nonemployees to act as miners' representatives for walkaround purposes." *Id.* The Court noted that miners may benefit from the participation of nonemployee representatives in walkaround because such representatives "may have greater expertise in health and safety matters than an employee representative." 897 F.2d at 451.

In *UP&L*, the mine operator had argued that the Secretary's interpretation of section 103(f) in the Part 40 regulations was not reasonable, in part, because it would

allow the representative of a union to gain access to a nonunion mine for purposes unrelated to the Act's safety objectives. 897 F.2d at 452. In addressing this argument, the Court stated:

> While we recognize UPL's concern that walkaround rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.

*Id.* Contrary to Kerr-McGee's assertions on review, the Court did not base its holding on the fact that, in that case, the miners were represented for NLRA purposes by a union and, therefore, the designation of a nonemployee union member as a miners' representative was permissible. Rather, the Court interpreted the language of section 103(f) to permit representation by nonemployees generally, including agents of a labor organization.

We discern no basis in section 103(f) or Part 40 for applying the principles set forth in *Emery/UP&L* only to situations where the designated representative is a member of a union that also represents the miners for collective bargaining purposes under the NLRA. The language of section 103(f) does not prohibit miners from designating agents of a union as their walkaround representatives on the basis that such miners are not represented by the union for collective bargaining purposes. To the contrary, the Commission has held that, under the broad language of section 103(f), miners possess the right to designate a

representative of their own choosing for section 103(f) purposes. *Emery*, 10 FMSHRC at 284-85; *Secretary on behalf of Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293, 1298 (September 1986). Further, the operators' position would limit nonunionized miners' right to designate representatives of their own choosing, thereby creating distinctions between unionized and nonunionized miners that have no basis in the statute.

The Commission held in *Emery* that section 103(f) specifically provides that the requirements set forth therein are "[s]ubject to regulations issued by the Secretary" and that the Secretary's pertinent regulations at Part 40 are consistent with the language of section 103(f). 10 FMSHRC at 285. Moreover, the Secretary's manner of enforcement of his regulations is consistent with those regulations and with *Emery*. Thus, the Secretary says that he does not determine who qualifies as a walkaround representative based on a person's status or motives. Oral Arg. Tr. 45-48. Instead, the Secretary focuses on the actual conduct of the miners' representative during the inspection. Oral Arg. Tr. 48. The Secretary states that it is irrelevant who is chosen as a miners' representative so long as the representative's "demeanor and behavior" is proper and consistent with the purposes of section 103(f). *Id.*

The Commission is aware, as was the 10th Circuit in *UP&L*, that allowing a union agent limited access to mine property under section 103(f) is subject to possible abuse. We agree with the Secretary and the judge that it is the conduct of a miners' representative, during a walkaround under section 103(f), rather than the motivation of such representative, that must be examined to determine

whether there has been abuse. Although the UMWA agents, Wolf and Butero, are organizing mines in the Powder River Basin, there has been no showing here that they will, through their conduct, abuse the rights and corresponding responsibilities of section 103(f). Kerr-McGee's concerns as to possible future problems are speculative. Conduct by a miners' representative that constitutes abuse can be addressed on an individual basis by an operator and the Secretary, while generally preserving the right of miners to select representatives of their choice. *See UP&L*, 897 F.2d at 452.

Kerr-McGee also seeks reversal of the judge's decision on the basis that Part 40, as applied here, conflicts with the NLRA. The NLRA broadly guarantees employees the right to "bargain collectively through representatives of their own choosing. . . . " 29 U.S.C. § 157. The Mine Act, on the other hand, is a more narrowly tailored statute that pervasively regulates the safety and health of employees in one industry. In effect, the operators ask the Commission to read into section 103(f) of the Mine Act the concept of collective bargaining representation under the NLRA with the result that a nonemployee agent of a union could not be a miners' representative unless he is also a duly certified bargaining representative at that mine. When promulgating Part 40, the Secretary concluded that it would be inappropriate to incorporate the NLRA definition of a "representative" because "the meaning of the word representative under [the Mine] Act is completely different." 43 Fed. Reg. 29508 (*see* n.8 *supra*).

Although we cannot ignore other statutes when interpreting the Mine Act, nothing in the Mine Act or general

principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. Our proper field of judicial inquiry is the Mine Act. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 645-47 (1990). We agree with the Secretary that he is not required to integrate the NLRA's concepts of collective bargaining representation into his regulations implementing the Mine Act. Nor is this Commission required to integrate NLRA concepts into its interpretation of the Mine Act. *See, e.g., UMWA on behalf of James Rowe et al., etc. v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364-65 (September 1985), *aff'd*, 822 F.2d 1134 (D.C. Cir. 1987).

The restrictions that have developed under the NLRA concerning nonemployee access to an employer's property for organizing or related purposes arise under a statute "whose very purpose is the governance of labor-management relations." *Peabody*, 7 FMSHRC at 1365. The discrete safety and health purpose of the Mine Act, and the text of section 103(f), render these NLRA principles inapplicable here. As noted, the Secretary rejected the approach advocated by the operators when he promulgated Part 40. *See UP&L*, 897 F.2d at 452; *Emery*, 10 FMSHRC at 285. We hold that the concept of representative as it has developed under the NLRA is not determinative of the miners' representative designation process under Part 40.

The Supreme Court's decision in *Lechmere* does not require a different result. *Lechmere* construed the provisions of the NLRA governing the access rights of nonemployee union organizers to employers' private property. In *Lechmere*, the Court was concerned with "the relationship between the rights of employees under § 7 of

the [NLRA] . . . , 29 U.S.C. § 157, and the private property rights of employers." *Lechmere*, 117 L.Ed.2d at 85. The Court did not address general legal principles relating to the balancing of property rights of employers against federal regulatory requirements established under other statutes, such as the Mine Act. *Lechmere* does not reverse walkaround law as it has developed under the Mine Act and does not overrule *UP&L*.

Under the Mine Act, nonemployees may enter a mine for the limited purpose of accompanying MSHA inspectors during their inspection of a mine. The Mine Act entails pervasive regulation and a diminished expectation of full enjoyment of private property rights. For example, search warrants for government inspections are not required because, in part, the Mine Act "is specifically tailored to address [Congress' safety and health] concerns, and the regulation of mines [that] it imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection.' " *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (citation and footnote omitted). Accordingly, the Court's analysis of the property rights of employers in *Lechmere*, which relates solely to employee organizing rights under the NLRA, is not applicable to this case.

To the extent that Kerr-McGee is seeking a resolution of rights and obligations under the NLRA, it is in the wrong forum. If the Secretary, either through regulation or enforcement, requires an operator to take specific actions that could constitute an unfair labor practice or would otherwise conflict with the NLRA, the proper forum to resolve such conflicts is the National Labor Relations Board ("NLRB"). The NLRB may determine

whether the Mine Act's requirements or the Secretary's implementing regulations serve as a defense to an unfair labor practice charge.

III.

Conclusion

For the foregoing reasons, the Judge's decision is affirmed.

/s/ Arlene Holen
Arlene Holen, Chairman

/s/ Richard V. Backley
Richard V. Backley, Commissioner

/s/ Joyce A. Doyle
Joyce A. Doyle, Commissioner

/s/ L. Clair Nelson
L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

(DEC 9 1991)

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| KERR-MCGEE COAL CORPORATION,<br>Contestant | : CONTEST PROCEEDINGS<br>: Docket No. WEST 91-84-R<br>: Citation No. 3242337; 10/25/90 |
| v. | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION,<br>Respondent | : Docket No. WEST 91-85-R<br>: Order No. 3242340; 10/25/90<br>: Jacobs Ranch |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION,<br>Petitioner | |
| v. | : CIVIL PENALTY PROCEEDING |
| KERR-MCGEE COAL CORPORATION,<br>Respondent | : Docket No. WEST 91-220<br>: A.C. No. 48-00997-03513<br>: Jacobs Ranch |

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner;

Charles W. Newcom, Esq., SHERMAN & HOWARD, Denver, Colorado, for Contestant/Respondent.

Before: Judge Lasher

These three consolidated contest/civil penalty proceedings came on for hearing in Denver, Colorado, on July 23, 1991. Kerr-McGee Corporation (herein "K-M") in two contests challenges Citation No. 3242337 issued on October 25, 1990, by MSHA Inspector Jimmie Giles[1] charging a violation of 30 C.F.R. § 40.4 and § 104(b) "failure to abate" Withdrawal Order No. 3242340[2] issued approximately 10 to 20 minutes after the Citation was issued. The Secretary of Labor (herein "MSHA") in the related penalty proceeding captioned seeks assessment of a penalty for the violation alleged in the citation.

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[1] The Citation, issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (herein "the Act"), describes the alleged violation in these terms: "The operator has failed to post a list of the representatives of the miners on the mine bulletin board." The Citation, which was served on Ron Crispin, Manager of K-M's Jacobs Ranch Mine, did not designate the infraction as "significant and substantial."

[2] This "no area affected" Order, which did not close or shut down any area of the mine or equipment, alleged "The operator has made no effort to post a list of the miners' representatives on the mine bulletin board, and refuses to do so." In its Notice of Contest, K-M contends that "No violation can be found because the designation of the United Mine Workers of America as a representative of miners under 30 C.F.R. part 40 for Jacobs Ranch Mine miners is improper."

Contentions of the Parties

The general issues are whether K-M violated 30 C.F.R. Part 40.4 and § 103(f) of the Act by failing to post the designation of representative of miners (in the record three times as Exhibits K-1, M-1, and A-1 to the stipulation) and, if so, the appropriate amount of penalty for such violation.

As MSHA points out, there is no question that K-M did not post the "designation" and that it refused to abate the allegedly violative practice by posting it after being requested to do so by MSHA – which resulted in MSHA's issuance of a "failure to abate" withdrawal order. The issue then is whether the defenses asserted by K-M relieve it from posting the designation and excuse the failure to abate.

K-M states the issues as:

1. Can a union, or an employee of that union, "represent" miners at a mine when the union does not represent the mine's employees pursuant to the provisions of the Labor Management Relations Act ("LMRA")?

2. Does MSHA's application to 30 C.F.R. Part 40 create an unnecessary and improper conflict between MSHA's regulations and the LMRA?

3. Under *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990) is it an "abuse" for a union, which does not represent employees at a mine pursuant to the provisions of LMRA to seek to become a "representative of miners" under 30 C.F.R. Part 40 to facilitate organizing efforts at the mine?

4. If a union's use of 30 C.F.R. Part 40 would require a mine operator to waive its rights under the LMRA, is such a use of Part 40 an "abuse?"

K-M's contentions then are:

1. Properly interpreted, 30 C.F.R. Part 40 requires that before a labor union, or an employee of a union, can "represent" miners and thus be a "Representative of Miners," under the Act the union must be certified as a representative under the LMRA (T. 33-34);[3]

2. MSHA's application of 30 C.F.R. Part 40 to K-M unnecessarily and impermissibly conflicts with the LMRA (T. 43, 44);

3. The designation in this matter is for union organization purposes and is thus an abuse of Mine Act regulations as applied to K-M, and under *Utah Power & Light, supra,* K-M can take action against the abuse (see T. 37);

In this connection, KM alleges that "Both the UMWA's attempt to gain under Mine Act regulations what it cannot acquire under the LMRA (access to mine property and various mine records, and a role in mine business as it relates to health and safety . . . ) and MSHA's proposed application of Part 40 at K-M which aids the UMWA in this organizing endeavor are an abuse."

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[3] K-M's Jacobs Ranch Mine employees have never been represented for collective bargaining purposes by UMWA or any other union. (T. 75).

4. K-M, in this litigation, does not raise the issue of technical defects in the designation of miners (T. 49).

30 C.F.R. Part 40, headed "Representative of Miners" consists of five sections which appear below.

The Regulation

**§ 40.1 Definitions.**

As used in this Part 40:

(a) "Act" means the Federal Mine Safety and Health Act of 1977.

(b) "Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) "Representatives authorized by miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

**§ 40.2 Requirements.**

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by § 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represet [sic] them under various

sections of the act relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

(Approved by the Office of Management and Budget under control number 12190042)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 29509, July 7, 1978, as amended at 47 FR 14696, Apr. 6, 1982]

**§ 40.3 Filing procedures.**

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name, address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; of [sic] if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information fled [sic] is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

**§ 40.4 Posting at mine.**

**A copy of the information provided the operator pursuant to § 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.**

**§ 40.5 Termination of designation as representative of miners.**

(a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.

(b) The Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated pursuant to paragraph (a) of this section or which are not in compliance with the requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

## FINDINGS

A. Stipulated Facts (Ex. M-7)

1. Kerr-McGee is the owner and operator of the Jacobs Ranch Mine, located in Campbell County, Wyoming. There are no issues of jurisdiction in this matter.

2. On or about July 24 and 25, 1990, seven miners employed at the Jacobs Ranch Mine signed Exhibit A to the Stipulation which may be introduced into evidence in this case.

3. Exhibit A[4] lists the UMW as the miners' representative and lists UMW representatives to represent miners at the Jacobs Ranch Mine.

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[4] The stipulation refers to Exhibits "A", "B", and "C", which are described in the stipulation and are contained in the Exhibits file as part of the record.

4. Employees at the Jacobs Ranch Mine have never been unionized by the UMW or any other union.

5. One of the UMW representatives, Dallas Wolf, resides in Gillette, Wyoming, and is International Teller/ Organizer for the UMW, who is living in Gillette for the purpose of unionizing the coal miners in the Powder River Basin, including the miners at the Jacobs Ranch Mine.

6. The second listed UMW representative, Bob Butero, resides in Trinidad, Colorado, and is an international representative of the UMW.

7. After Exhibit A was signed by the seven employees listed thereon, it was mailed by Dallas Wolf to the District Manager, Coal Mine Safety and Health, District 9 in Denver, Colorado.

8. Exhibit A was received by the Coal District 9 office and returned to Mr. Wolf for further information. The additional information was provided and received by the Coal District 9 office on or about August 30, 1990.

9. On or about September 6, 1990, the Coal District Manager, District 9, mailed a letter to Mr. Wolf, acknowledging receipt of Exhibit A.

10. The letter to Dallas Wolf from William Holgate, dated September 6, 1990, acknowledging receipt of Exhibit A is attached as Exhibit B and may be admitted into evidence in this case.

11. Dallas Wolf mailed Exhibit A to K-M Jacobs Ranch Mine, on or about August 30, 1990.

12. Exhibit A was received by the Jacobs Ranch Mine and discussed by K-M management at the mine and at the office in Oklahoma City, Oklahoma. It was determined by management that the designation would not be posted at the time, or in any other location because of the view of K-M, which MSHA disagrees with, that Exhibit A is not proper under 30 C.F.R. 40.

13. On or about October 25, 1990, MSHA received a 103(g) complaint regarding the Jacobs Ranch Mine. The complaint alleged that Exhibit A had not been posted at the mine as required by 30 C.F.R. 40.4.

14. Upon receipt of the complaint, Coal Mine Inspector Jimmie Giles proceeded to the Jacobs Ranch Mine and presented a copy of the complaint to mine management, including Ron Crispin.

15. Mr. Crispin informed Mr. Giles that Exhibit A had not been posted. During the visit by Inspector Giles, Mr. Crispin read a statement of position to Mr. Giles. The statement of position is attached hereto as Exhibit C and may be introduced into evidence in this case.

16. Thereupon, Inspector Giles issued a 104(a) citation to the Jacobs Ranch Mine for a violation of 30 C.F.R. 40.4, Citation No. 3242337.

17. Inspector Giles informed the mine operator, through Mr. Crispin, that they would have approximately 15 minutes to abate the Citation by posting Exhibit A.

18. Mr. Crispin conferred with the Oklahoma City office and determined that the operator would not post Exhibit A.

19. After about 20 minutes, Exhibit A had not been posted and Inspector Giles had been notified that the mine would not post it. Inspector Giles the [sic] issued Order No. 3242340, a 104(b) order for failing to abate a citation.

20. Mr. Giles then left the mine and returned to his office in Sheridan, Wyoming.

21. As a result of the citation and order, K-M management representatives traveled to McAlester, Oklahoma, for a conference with MSHA sub-district manager, Joseph Pavlovich. No change was made in the citation or order as a result of the conference.

22. On or about November 16, 1990, K-M filed a timely notice of contest with regard to the citation and order issued in this matter. Thereupon, the Secretary of Labor filed a timely response.

B. Findings in Connection with Stipulation

Exhibit M-1 (Ex. A to the Stipulation entered into by the parties) consists of a total of nine pages and

a. designates Bob Butero, International Safety representative and Dallas Wolf, International Teller,[5] of UMWA as "representatives" and seven employees as "alternate representatives" to serve as representatives of the miners under the Federal Mine Safety and Health Act of 1977, "for all purposes" (T. 32),

b. was "submitted as required" by 30 C.F.R. 40.3, and

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[5] Exhibit K-36, page 11.

c. prior to the submission of Exhibit M-1 there had been no prior designations, i.e., no miners' representatives under the Mine Act at the subject mine (T. 26-28, 54, 151).

Exhibit C to the Stipulation, Respondent's written statement of position objecting to the designation referred to in paragraph 14 of the Stipulation which was read to the MSHA inspector who issued the Citation, provides as follows:

> Kerr-McGee does not believe it can lawfully be required to accept the designation of a non-employee walk-around representative at the Jacobs Ranch Mine or to recognize any other action by a non-employee. MSHA Inspectors are entitled to, and encouraged to, talk to Jacobs Ranch employees as a part of all inspections. Inspections should proceed on that basis without outside interference.[6]

C. General Findings

The subject coal mine is located in the Powder River Basin of Wyoming. The UMWA, since the summer of 1990, has been actively seeking to unionize the subject

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[6] I find it significant that this was the reason K-M gave *at the time* for its refusal to post the designation and that on its face, the basis so asserted directly contradicts the fundamental holding of the landmark case, *Utah Power & Light Co., supra*, that non-employee persons and organizations can serve as miners' representatives for walk-around purposes. The emphasis here is on opposition to "non-employee walk-around" representatives and "outside interference." Nothing is said about "abuse," even assuming *arguendo* that at this juncture recognizable abuse was a viable legal concept.

mine as well as other mines in the Powder River Basin. Dallas Wolf is an international representative of the UMWA who moved to Gillette, Wyoming, in April 1990, to engage in union organizing activities. The UMWA held several meetings in Gillette which were attended by Jacobs Ranch miners, which meetings were organized by Mr. Wolf. In July 1990, the UMWA sponsored several days of safety training, presented by Robert D. Butero, International Health and Safety representative residing in Trinidad, Colorado. Issues discussed during the safety training included safety and walk-around rights of miners. At the end of the safety training sessions, July 24 and 25, 1990, seven Jacobs Ranch miners signed the designation (Ex. M-l). Mr. Wolf played a key role in the preparation, circulation, and filing of the designation. The use of 30 C.F.R. Part 40 and the designation of miners' representatives was part of UMWA's organizing strategy and was an organizing "tool."[7]

After the designation was signed, it was sent to MSHA and was received on August 18, 1990. Concurrently, Mr. Wolf mailed a copy to the mine.

Subsequently the designation was corrected by additional information and completed forms were sent to and received by MSHA and K-M. (Exs. M-3 and M-4).

Upon receipt of the designation, K-M by general management decision determined not to post it even

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[7] In this record K-M at best showed UMWA used Part 40 as a "tool" to create employee interest and to enhance its standing. Beyond that K-M's fear as to UMWA's future action was speculative.

though it was familiar with the UP&L decision granting walk-around rights to non-employees (T. 147). K-M's determination not to post was made several months prior to the appearance of MSHA Inspector Jimmie Giles at the mine when the Citation and Order were issued. K-M made no protest of the designation during this period and the testimony of its Manager of Administration, Ronnie D. Crispin, in this and related connections has considerable significance in this matter:

Q. Okay. In between the time you decided not to post and the time Mr. Giles wrote his citation, did you send any letters to MSHA explaining why you didn't want to post that designation form?

A. No, we did not.

* * *

Q. Mr. Crispin, is it your understanding that this designation, Exhibit M-1, is somehow abusive or something that was abused by the union? Is that your understanding of M-1?

* * *

A. Personally, I feel, yes, it's an abuse of intent in that.

Q. (My [sic] Ms. Miller) Will you explain why you think that with regard to this document.

A. Because it designates United Mine Workers as a Representative.

Q. What's abusive about that?

A. Because, obviously, they do not represent our employees.

Q. In the collective bargaining sense, they don't represent your employees?

A. That's correct.

Q. Is there anything else that you see that's abusive about that document, anything else, or is that the –

A. That's the issue.[8] (T. 148-149)

On or about October 25, 1990, MSHA received a Section 103(g) complaint stating that the Jacobs Ranch Mine had not posted the designation of representative form as required by Part 40 regulations. Inspector Giles then traveled to the mine on that day and presented the complaint to mine management, i.e., Ron Crispin. Mr. Crispin informed the inspector that, indeed, the designation had not been posted and that it would not be posted. Crispin told Inspector Giles that the two miners designated as walk around representatives were union members and were not employed at the Jacobs Ranch Mine. Mr. Crispin further indicated that the mine had not received a notification from MSHA that the designation was a valid one. Inspector Giles then called his supervisor and the Denver District Office to determine the status of the designation form. Giles learned that MSHA did not notify K-M regarding a designation but that the representative of miners provided a copy to the operator, as noted on the form. He then issued the 104(a) citation and, as shown in the stipulation, informed K-M that he

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[8] In terms of K-M's intent and purpose in refusing to post the designation, this testimony coincides with the written-out reason given to Inspector Giles when the Citation and Order were issued.

would allow them 15 minutes to post the designation, and abate the decision. Mr. Giles hereafter was informed that the designation would not be posted and he then issued the 104(b) order for a failure to abate.

On January 2, 1991, MSHA District Manager, William Holgate, had a letter hand-delivered to K-M. The letter informed K-M of his intention to request that the assessment office begin a daily penalty if the citation was not immediately abated. K-M was given 24 hours to abate and it did so at that time.

Normally, the procedure for an inspection is for the inspector to be accompanied by a representative of the operator and a representative of the miners. Upon arrival at the mine, the MSHA inspector will contact the operator to let him know that he is at the mine and ask if there is a designated representative of the miners available. If so, the inspector will contact that representative; if not, he may ask the miners present if they would like to select someone to accompany the inspector. (Tr. 166). The inspector is supposed to control the inspection and if the representative of the operator or the representative of the miner who is accompanying the inspector does something inappropriate the inspector should interrupt the inspection and explain that the representative is to only accompany the inspector and assist him in the inspection. (T. 167). The inspector would stop a representative from engaging in any union organizing activity and if it persists would prohibit that representative from participating in the inspection. (T. 168).

Based on many years of experience, MSHA subdistrict manager Joe Pavlovich testified to the practical aspects of a walk-around representative's duties:

> A. Basically, what the person does is just travel with an inspector and assist him most of the time. What we end up finding is, we probably train the people in health and safety regulations, as much as anything, through their accompaniment and asking questions and showing them what the correct interpretations of the regulations are and the conditions that we find. (T. 168-169).
>
> Q. Is there a time when someone who is not employed at the mine might be valuable to the inspector.
>
> A. Well, we have had people involved in accident investigations who would not be familiar with the mine, but they are valuable to the inspection work force at the time, usually in their knowledge of accidents or accident types or assistance in mine rescue or whatever we're involved in at the time. (T. 169).

During the course of the inspection, the walk-around representative will have access to certain training records. (See, for example, Exhibit M-17). In spite of testimony to the contrary by Mr. Crispin, that is the only non-public record that is kept by the mine that the inspector and the representative might view. The other documents that would be accessible to a miners' representative are accessible to the general public, and the miners' representative thus does not see anything that he could not otherwise see or review. (T. 171-173).

DISCUSSION AND ADDITIONAL FINDINGS

The position of MSHA is found meritorious and is adopted.

Examination of the pertinent provision of the Act and the regulations disclose no restrictions or qualifications on "persons" or "organizations" in their inherent right to serve as representatives of miners. Specifically, there is no requirement of prior certification by the National Labor Relations Board (see T. 34) nor any intimation of such to be found. The term "representative of miners" includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative *under other labor laws.* (See Legislative History Conference Report excerpt, Ex. M-6). The language of the regulation is express. It is concluded that UMWA was at material times an "organization" within the meaning of 30 C.F.R. 40.1(b)(l) and was not barred from representing miners as authorized by MSHA's regulations. The interpretations of MSHA to this effect have been consistent. Likewise precedent has been consistent, including the *Utah Power & Light* decision mentioned previously.

In *Secretary of Labor v. Benjamin Coal Company,* 9 FMSHRC 17, 51-52 (January 1987), Judge George Koutras stated " . . . it seems clear to me that in addressing the very concerns raised by the respondent [Benjamin Coal] with respect to the application of the collective bargaining provision of the National Labor Relations Act with respect to the definition of the term "representative," the Secretary, in promulgating Part 40 clearly distinguished the NLRB law and the Mine Act purposes and rejected

any notion that a representative of miners can only be based on any 'majority rule.' . . . I conclude . . . that the fact that the UMWA may not represent the respondent's miners for purposes of NLRB or NLRA collective bargaining purposes does not foreclose its representation of the miners who designated it to act as their representative in the exercise of their rights under the Mine Act."

I find merit in MSHA's position that there is no conflict between the Mine Safety and Health Act and the Labor Management Relations Act in their application here. Although K-M uses the term "representative" in discussing both Acts, the term does not have the same meaning in both Acts. Under the LMRA, a representative is elected by a majority of the workers, pursuant to LMRA regulations. The purpose of the representative is to present the needs of the employees to the employer, concerning terms and conditions of employment. Pursuant to the LMRA "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . " 29 U.S.C. § 159(a). The representation, under the Labor Management Relations Act, is pervasive; it covers virtually all aspects of the labor-management relationship, and for a long term. The requirements of the LMRA that both sides are obliged to meet are extensive, and have been the subject of a long legal history. By contrast, under the Mine Safety and Health Act, a representative can be

chosen by only two or more miners, pursuant to regulation, solely for the purpose of accompanying the mine inspector during his inspection.[9] "Representative of Miners" is defined at 30 C.F.R. § 40.1(b) as "Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act."

MSHA has determined that any person qualified to be on a mine site may act as miner's representative. The representative need not be an employee of the mine, nor a member, or nonmember, of any labor or other organization. Because the Secretary is charged with administering the Mine Act, a remedial statute, the Secretary's construction of the Act "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. In order to sustain construction by the agency that administers the statute, a Court need only find that the agency's interpretation is reasonable. *Unemployment Compensation Comm'n v. Aragon*, 328 U.S. 143, 154-154 (1946). The Court "need not find that [the administering agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceeding." *Id.* at 153. Accord: *Udall v. Tallman*, 380 U.S. 1,

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[9] MSHA seeks a representative of miners at each mine for the purpose of assisting the mine inspector and accompanying the inspector to point out any problems that miners may have noticed. The representative remains with the inspector during the investigation and his only allowed activity is that of advising and observing the mine inspector. Should the representative engage in any other activity, he will be asked to leave and another representative will join the inspector. In MSHA terms, this person is a "walk-around representative."

16 (1965); *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). As the Tenth Circuit states in a case dealing with the Secretary's interpretation of the similar Occupational Safety and Health Act:

"[The] interpretation given a statute by the administrative agency charged with carrying out the mandate of the statute of the statute should be given great weight. Indeed, the interpretation given a statute by the administrative agency charged with its enforcement should be accepted by the courts, if such interpretation be a reasonable one. And this is true even though there may be another interpretation of the statute which is itself equally reasonable." *Brennan v. OSHRC*, 513 F.2d 553, 554 (10th Cir. 1975).

In this regard, the Mine Act Senate committee report states: "Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts. S. Rep. No. 95-181, 95th Con., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978).

The Secretary's interpretation of the statute and regulation is actually supported by the Tenth Circuit's decision in *Utah Power & Light Company v. Secretary of Labor, supra*. In that case, miners at the Deer Creek Mine in Utah designated as a representative of miners for walk-around purposes a member of the United Mine workers who was

not employed at the Deer Creek Mine. Although the Deer Creek Mine also recognized the UMW as a representative for collective purposes pursuant to the LMRA, the Court focused on the meaning of "representative" as used in the Mine Act in determining that "the Act clearly spells out the purpose of a miners' representative's participation in an inspection." That participation is solely to aid the inspector in this investigation. The Court did not compare a walk-around representative to a collective bargaining representative for purposes of the LMRA. The statements made by the Court with regard to the meaning of "representative" were in the context of addressing the issue raised by the mine operator, that if non-employees of the mine were allowed to act as walk-around representatives, it may open the door for unions to participate at mines not represented by a labor organization. The Court found no merit in the operator's contention that would cause it to limit walk-around rights. Instead, the Court determined that the Mine Act and the regulations place no limits on who may be chosen as a walk-around representative and hence it is logical to infer that the "no limitation" aspect of the designation extends to members of labor and other organizations. The Court noted that the Secretary's position was amply supported by the history of the Mine Act, and that the Secretary's interpretation of the Act was "reasonable and supportable." (See T. 174).

The Court, in passing, merely noted the argument of the mine operator regarding possible abuse, and dismissed the argument with the one sentence that K-M relies on here. That sentence, when read in the context of the decision, does not give K-M the right to ignore the

posting requirements and to ignore an order issued by MSHA. The Court stated:

> UPL's argument ignores the fact that, as with a federal inspector, the Act clearly spells out the purpose of a miners' representative's participation in an inspection. Section 103(f) provides that an authorized miner's representative shall have the opportunity to accompany a federal inspector during the inspection of a mine "for the purpose of aiding such inspection." While we recognize UPL's concern that walk-around rights may be abused by non-employee representatives, the *potential* for abuse does not require a construction of the Act that would exclude non-employee representatives from exercising walk-around rights altogether. The solution is for the operator to take action against *individual instances* of abuse when it is discovered. (Emphasis added.)

K-M has shown no individual instance of abuse in this case. Nor has it shown, beyond speculation, that UMWA's organizing strategy, or for that matter the purposes of any of those signatory to the designation, contemplated misuse of Part 40 rights by either "outside" or fifth-column type infiltration of working areas to enlist members, distribute literature, purloin confidential K-M records, etc., under the facade of Mine Act walk-around participation. I am unable to conclude, absent clearer basis and authority to do so, that the exercise of important safety rights *granted* under one Act of Congress can *per se* be abusive because such exercise is either controlled or influenced to some degree by an organization engaged in union organizing the rules for which are set forth by an agency created by another Act of Congress.

One would reasonably expect that both parties, having various rights under various laws and regulations, would exercise them.

The exercise of rights under the Mine Act by certain K-M employees to desgnate [sic] UMWA as their "representative of miners" is found not to be an "abuse" even though UMWA has not been certified as collective bargaining representative for K-M's employees or appropriate units of them.

## CONCLUSIONS

1. The exercise of a right given under one law, the Mine Safety and Health Act, as part of a labor organization's program to organize miners under another labor law, is not per se an "abuse." If, in exercising the right, "individual instances" occur where a union engages in improper conduct, then the question of specific abuse arises and must be determined on a case by case basis.

2. In the process of designation of miners' representatives under the Act the subjective intent of the union, organization, or person does not determine whether there is an abuse. The right to designate miners' representatives exists under the Act independent of whether union organizing is ongoing (and is an ulterior motive), and "abuse" thereof must be something beyond the exercise of the right.

3. Conversely, depriving a union, other organization, or person of their full rights under the Mine Act to designate a representative under the Act by failing to *post the designation*, while being part of a mine operator's own

opposition to organizing efforts can at the same time be a violation of the Act.

In conclusion, no merit is found to the defenses and contentions raised by K-M which have been specified previously herein and analyzed. The fact that it refused to post the designation is admitted. Accordingly, the violation as charged in the Citation and Order is found to have occurred.

Assessment of Penalty

K-M is a large mine operator (265-270 employees in 1990); (T. 135) with a history of eight prior violations during the pertinent two-year period preceding the instant violation. (Ex. M-5).

The violation is found to have occurred as a result of a well-deliberated decision by K-M to challenge the validity of the regulation requiring posting of the miners' designation of representatives made in the background of its resistance to the UMWA organizing campaign. In gauging culpability, whether negligence or deliberate action, the reason originally assigned by K-M for refusing to post the designation appears to rest on thin legal ground, and the failure to post did deprive miners of rights guaranteed in the Act and implementing regulations.

The infraction was of a moderate degree of seriousness since it deprived the miners of their rights (T. 55) including their right to know who their representatives

were and the scope of their authority so that safety concerns could be communicated to the in advance of inspection.[10]

Finally, it does not appear that K-M, upon notification of the violation, proceeded to promptly abate the same.

In mitigation, it is noted that K-M established that it has a favorable safety record.

Upon consideration of the foregoing, a penalty of $300 is found appropriate for this violation and such is here ASSESSED.

ORDER

1. Contestant K-M's Notices of Contest in the two Contest Proceedings are **DENIED:** Citation No. 3242337 and Withdrawal Order No. 3242340 are **AFFIRMED;** the two Contest proceedings are **DISMISSED.**

2. Respondent K-M shall, within 30 days from the date of this decision, pay to the Secretary of Labor the sum of $300 as and for the civil penalty above assessed.

/s/ Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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[10] As the Tenth Circuit Court stated in *Utah Power & Light Co., supra,* " . . . knowledge on the part of the miners of the identity, whereabouts, and scope of responsibility of their representatives promotes the purposes of the Act." (See T. 53-54).

Distribution:

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 93-1250** **September Term, 1994**

Kerr-McGee Coal Corporation,

Petitioner,

v.

Federal Mine Safety and
Health Review Commission,

Respondent

BEFORE: Silberman, Sentelle and Rogers, Circuit Judges

**ORDER**

(Filed Jan. 17, 1995)

Upon consideration of petitioner's Petition for Rehearing filed December 16, 1994, it is

**ORDERED,** by the Court, that the petition is denied.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 93-1250** **September Term, 1994**

Kerr-McGee Coal Corporation,

Petitioner,

v.

Federal Mine Safety and
Health Review Commission,

Respondent

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

**ORDER**

(Filed Jan. 17, 1995)

Petitioner's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

**ORDERED**, by the Court, *in banc*, that the suggestion is denied.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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**30 U.S.C. § 813(f)**

* * *

**(f) Participation of representatives of operators and miners in inspections**

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

* * *

## 30 C.F.R. Part 40

## PART 40 – REPRESENTATIVE OF MINERS

Sec.

40.1 Definitions.

40.2 Requirements.

40.3 Filing Procedures.

40.4 Posting at mine.

40.5 Termination of designation as representative of miners.

AUTHORITY: Secs. 5(f)(1), 101(c) and (e), 103(c), (f), (g)(1) and (g)(2), 104(c), 105(a), (b)(1), (c)(1), (c)(2), (c)(3), and (d), 107(b)(1) and (e)(1), 109(b), 115(a)(1) and (a)(2), 302(a), 305(b), 312(b), 505 and 508, Federal Mine Safety and Health Act of 1977, Pub. L. 91-173 as amended by Pub. L. 95-164, 83 Stat. 745, 91 Stat. 1294, 1295, 1298, 1299, 1301, 1303, 1304, 1305, 1308, 1310 and 1316, 83 Stat. 766, 777, 785, 802, and 803 (30 U.S.C. 804(f)(1), 811(c) and (e), 813(c), (f), (g)(1) and (g)(2), 814(c), 815(a), (b)(1), (c)(1), (c)(2), (c)(3) and (d), 817(b)(1) and (e)(1), 819(b), 825(a)(1) and (a)(2), 862(a), 865(b), 872(b), 954 and 957); sec. 307, Federal Mine Safety and Health Amendments Act of 1977, Pub. L. 95-164, 91 Stat. 1322 (30 U.S.C. 801 note).

SOURCE: 43 FR 29509, July 7, 1978, unless otherwise noted.

**§ 40.1 Definitions.**

As used in this Part 40:

(a) *Act* means the Federal Mine Safety and Health Act of 1977.

(b) *Representative of miners* means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) *Representatives authorized by the miners, miners or their representative, authorized miner representative,* and other similar terms as they appear in the Act.

**§ 40.2 Requirements.**

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by § 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the act relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

(Approved by the Office of Management and Budget under control number 1219-0042)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 29509, July 7, 1978, as amended at 47 FR 14696, Apr. 6, 1982]

**§ 40.3 Filing procedures.**

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name, address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; or if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information filed is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

**§ 40.4 Posting at mine.**

A copy of the information provided the operator pursuant to § 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

**§ 40.5 Termination of designation as representative of miners.**

(a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.

(b) The Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated

pursuant to paragraph (a) of this section or which are not in compliance with the requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

Supreme Court, U.S.
FILED
MAY 12 1995
OFFICE OF THE CLERK

No. 94-1685

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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KERR-MCGEE COAL CORPORATION,
a Delaware corporation,
*Petitioner,*

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; ROBERT REICH, as Secretary of Labor, United States Department of Labor; MINE SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; and INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF *AMICI CURIAE* NATIONAL MINING ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

The Federal Mine Safety and Health Act of 1977 requires the Secretary of Labor to inspect the Nation's mines and allows "a representative" of miners to accompany the Secretary on his inspection. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), this Court explained that statutes should not be construed in a manner that infringes basic property rights unless such a construction is necessary to fulfill the purposes of the statute.

The question presented is whether the Secretary's interpretation of the Mine Act to permit non-employee union organizers to be named miners' representatives at a non-union mine in contravention of the mine operator's common-law right to exclude such persons from his property is a reasonable interpretation of the Act.

## *AMICI CURIAE*

The *amici curiae* are the National Mining Association, Wyoming Mining Association, Utah Mining Association, Alabama Coal Association, Coal Operators and Associates of Kentucky, Illinois Coal Association, Virginia Coal Association and West Virginia Mining and Reclamation Association.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-1685

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KERR-MCGEE COAL CORPORATION,
a Delaware corporation,
*Petitioner,*

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; ROBERT REICH, as Secretary of Labor, United States Department of Labor; MINE SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; and INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF *AMICI CURIAE* NATIONAL MINING ASSOCIATION, *ET AL.* IN SUPPORT OF PETITIONER

---

The National Mining Association, Wyoming Mining Association, Utah Mining Association, Alabama Coal Association, Coal Operators and Associates of Kentucky, Illinois Coal Association, Virginia Coal Association and West Virginia Mining and Reclamation Association, as

*amici curiae* [1] file this brief in support of a petition for a writ of certiorari filed by Kerr-McGee Coal Corporation ("Kerr-McGee"), and respectfully request that the Court grant the petition.

## INTERESTS OF THE *AMICI CURIAE*

The eight *Amici* represented here constitute a cross-section of national and state trade associations whose members are engaged in the minerals extractive industries.

The National Mining Association ("NMA") is a recently formed national trade association joining the National Coal Association ("NCA") and the American Mining Congress ("AMC"), each of whom participated as *amici curiae* in this litigation before the United States Court of Appeals for the District of Columbia Circuit and before the Federal Mine Safety and Health Review Commission. Members of the NMA include a substantial percentage of the nation's mining companies. Those members produce most of the nation's coal, metals and industrial and agricultural minerals. Additionally, NMA members include manufacturers of mining and mineral processing machinery, equipment and supplies, engineering and consulting firms, and financial institutions that serve the mining industry.

The Wyoming Mining Association and Utah Mining Association are each a mining industry state trade association whose membership includes most of the mining companies operating in their respective states.

The Alabama Coal Association, Coal Operators and Associates of Kentucky, Illinois Coal Association, Virginia Coal Association and West Virginia Mining and Reclamation Association are each a state trade association whose membership includes coal mining companies

[1] This brief of *amici curiae* is being filed with the consent of the parties, whose written statements of consent have been filed with the Clerk of the Court.

of all sizes, as well as coal brokers, coal transporters and coal resource owners and developers.

The central purpose of each *amici* is to represent the interests of its members in a wide range of public policy issues affecting the development, mining, and use of our nation's coal and mineral resources. This includes a regular participation in legislative, administrative and judicial proceedings in behalf of the mining industry on matters regarding mine safety and health, employer-employee relations, and other issues impacting the mining industry.

## STATEMENT OF THE CASE

*Amici curiae* adopt Kerr-McGee's statement of the case. They would underscore that the issues raised in Kerr-McGee's petition impact both non-union mines such as Kerr-McGee's Jacob's Ranch Mine and *amici curiae's* members' unionized mines. Indeed, the Secretary of Labor's ("the Secretary") interpretation of the Federal Mine Safety and Health Act of 1977 ("Mine Act") dramatically impacts *amici curiae's* unionized members. Under the Secretary's interpretation, competing unions seeking to oust incumbent collective bargaining representatives at a union mine could be designated as representatives of miners under Section 103(f), 30 U.S.C. § 813(f). Such a result not only improperly restricts the private property interests of the *amici curiae's* members but also unnecessarily injects conflict, if not havoc, in the labor relations of the Nation's union mines.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION OF THE D.C. CIRCUIT AND THE COMMISSION BEFORE IT ARE IN DIRECT CONFLICT WITH THE CONSISTENT HOLDINGS OF THIS COURT THAT, IN DETERMINING WHETHER A PARTICULAR ADMINISTRATIVE ACTION IS APPROPRIATE, AN EMPLOYER'S PRIVATE PROPERTY INTERESTS CANNOT BE ABROGATED BY CLAIMED GOVERNMENTAL STATUTORY/REGULATORY INTERESTS WITHOUT FIRST EVALUATING AND BALANCING THE COMPETING PRIVATE AND GOVERNMENTAL INTERESTS.

Governmental regulation at the federal, state and local levels regularly impacts the private interests of individuals and businesses. As detailed in Kerr-McGee's petition, this Court has consistently held, however, that where such governmental regulations restrict or eliminate interests such as those in private property, a close evaluation must be made of the asserted governmental interests in regulation as against the private interests being abrogated. Neither the Commission nor the D.C. Circuit made such a review here.

*Amici curiae* endorse, and incorporate, the points made in Kerr-McGee's petition in this regard. The Secretary's interpretation of the Mine Act ignores the property rights of mine operators and erroneously fails to evaluate and balance those interests with Mine Act enforcement needs.

Governmental agencies cannot limit private property interests merely because some regulator concludes the narrow interests of a single statute might be served. This is especially true here where the asserted interests of the Secretary not only conflict with the private property interests of Kerr-McGee, but also are at odds with the consistent decisions of this Court under federal labor law upholding broad limitations on non-employee union organizer access to company property. *See, Lechmere v.*

*NLRB*, 502 U.S. 527 (1992). Likewise, the consistent governmental policy of neutrality towards company-union matters cannot be overlooked.[2]

This Court has never limited its analysis of private property interests with competing governmental interests to whether the regulators' statutory/regulatory construction is reasonable within the confines of the regulatory scheme in issue. *E.g.*, *Lechmere, Inc. v. NLRB*, *supra*; *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); and *Donovan v. Dewey*, 452 U.S. 594 (1981). The decisions below that suggest such a restrictive view is proper should not be allowed to stand.

The D.C. Circuit and Commission decisions each ignore and conflict with the decisions of this Court mandating that governmental regulatory activity which limits or eliminates private property rights can only be undertaken after the asserted governmental interests are evaluated against and balanced with those private property interests. Neither the Commission nor the D.C. Circuit undertook that evaluation. This Court should grant certiorari and reject the notion that the Mine Act has a different status from other federal regulation.

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[2] Indeed, the same 95th Congress which passed the Mine Act had before it major labor law reform legislation. That legislation, among other things, had a so-called "equal access" provision which would have given unions an opportunity to address employees during working time where an employer had done so. Additionally, the proposed legislation provided that "[i]f the employer engaged in a 'concerted campaign' against the union, but did not halt production [to give a speech to workers], organizers would be allowed to enter non-working areas such as the lunchroom or parking lot." *Congressional Quarterly Alamanac*, 95 Congress 2d Sess. 1978, Vol. XXXIV, p. 285. The very Congress which passed the Mine Act specifically rejected the notion of giving union organizers access to company property. To urge, as the Secretary does here, that Congress impliedly did that in the Mine Act is simply wrong.

## II. THE DECISION OF THE D.C. CIRCUIT RAISES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW REGARDING THE FRAMEWORK FOR ANALYZING AND BALANCING COMPETING PRIVATE PROPERTY INTERESTS WITH ASSERTED INTERESTS OF GOVERNMENT REGULATORS.

The decisions below raise important and recurring questions of federal law—when and how must competing private property interests be balanced against asserted governmental regulatory interests. This Court in numerous cases has directed that an evaluation and balancing of these interests be undertaken. Merely determining that the asserted governmental interests are consistent with the narrow dictates of some statutory or regulatory objective has never before been sufficient to abrogate either an individual or a company's private property interests. *Lechmere, Dolan, Donovan,* and the many cases preceding them highlight the necessity for careful review and evaluation of competing private and governmental interests.

Indeed, the D.C. Circuit, in analyzing conflicts between two statutory schemes, describes well what should have been done here. In *New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988), the D.C. Circuit, relying extensively upon precedent in this Court, noted that "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand for an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.* at 1365 (citations omitted). In such a circumstance of conflicting interest, the administrative agency "must adequately explain not only why its interpretation is consistent with the shipping [mining] laws, but also why it accomplishes the accommodation [with private property interests] required (or, alternatively, why no accommodation is possible), and why any alternative,

more accommodating interpretations were rejected. In order to do this, the Commission must identify the relevant labor policies [property interests] that are to be accommodated, a task quite clearly beyond the Commission's claim of expertise and outside *Chevron's* rationale for deferential review." *Id.* The D.C. Circuit went on to hold that "no special deference" should be given to an administrative agency's decision under those circumstances. After detailed discussion and analysis of the interests, the D.C. Circuit upheld the Federal Maritime Commission's decision. The clear teaching is that competing interests must be balanced and cannot be resolved in the vacuum of the regulator's statute.

This issue has particular import for the mining industry. The Secretary has consistently taken the position that any two employees can designate anyone to be their representative under Section 103(f), 30 U.S.C. § 813(f), and 30 C.F.R. Part 40. The Secretary has made clear throughout this litigation that even at union mines two or more employees can designate a competing union as their representative to participate in inspections. Indeed, as pointed out before the D.C. Circuit, the Secretary takes the position that "a competitor would be a proper miners' representative, as would 'Whistler's Mother' and President Bush, despite the fact that they have no mine safety and health expertise." Brief of *Amici Curiae* American Mining Congress, National Coal Association and Wyoming Mining Association at 10, n.8.

The impact of the D.C. Circuit's erroneous conclusion that a labor union can be the "representative" of miners in a non-union mine is exacerbated by its uncritical acceptance of the Secretary's view that any representative, regardless of objectives, can be appointed by as few as two miners at a particular mine. A "representative of miners" is defined as "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act." 40 C.F.R. § 40.1(b)(1). The

court of appeals agreed that "an 'organization' that represents less than 50% of the miners may act as a miners' representative under the Secretary's regulations." 40 F.3d at 1262. A central unaddressed issue is when does an organization "represent" two or more miners.

The D.C. Circuit, and Commission before it, refused to interpret "represents" to mandate a showing of some recognized representational status for the person or organization as a prerequisite to appointment as a "representative of miners." Under the approach argued by Kerr-McGee, a union duly certified to represent all or some portion of a mine operator's employees could be designated under Section 103(f). A union with no status, other than a desire to unionize the mine's employees, could not. Failure to follow this approach allows any two miners to appoint anyone, regardless of expertise, and even though the appointed may have objectives other than health and safety.

This case also has major importance because of the practical impact of the decisions below on federal labor law.[3] A benchmark of the federal labor laws has been to maintain governmental neutrality in labor-management relations and to interfere in that relationship only to remedy unlawful conduct. By contrast, here, MSHA is interpreting Section 103(f) to give non-employee union organizers a role in Kerr-McGee's operations which goes beyond even the rights of a duly certified collective bargaining representative. The practical import of decisions such as *Lechmere* in allowing employers to keep non-employee union organizers out should not be subject to

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[3] This Court has before it now a case addressing the question of a union employee/organizer's status when he/she applies for employment at a company the union is seeking to unionize. *NLRB v. Town & Country Elec., Inc.*, No. 94-947, *cert. granted*, 63 U.S.L.W. 3556 (Jan. 24, 1995), *opinion below* 34 F.3d 625 (8th Cir. 1994). Issues of when and how union organizers may gain access to company property continue to draw major attention for all non-union employers.

the fortuity of whether the employer happens to be a mine operator.[4]

The effect of this federal government endorsement of union organizers can also be critical to the union election process. Decisions have invalidated union elections because of the endorsement of a union by a state official. *Columbia Tanning Corp.*, 238 NLRB 899, 900 (1978) (election set aside where state labor commissioner sent letter endorsing union). *See also LeBoe Tire & Rubber Co.*, 208 NLRB 84, 90-91 (1974) (upholding election objections where employer allowed union special use of company property).[5]

The issues here thus have broad implications for all mining employers in the context of their employee relations. Likewise, in departing from the traditional framework of balancing competing property interests with asserted regulatory interests, the issues here impact all areas where governmental regulations are at odds with their private property interests.

Finally, the Constitutional underpinnings of the issues here cannot be ignored. These were highlighted by Circuit Judge Sentelle in his concurrence. 40 F.3d at 1266. Kerr-McGee has not made a broad constitutional challenge to 30 U.S.C. § 813(f). Kerr-McGee has noted that its property rights are protected by the Fifth Amendment and has urged against that backdrop that those rights

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[4] This is further underscored since what constitutes a "mine" has itself been the subject of considerable dispute. *See, e.g., Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984).

[5] An employer which recognizes and deals exclusively with a union which does not represent a majority of its employees commits an unfair labor practice. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). While not strictly applicable, the Court's discussion of the importance of maintaining individual employee rights in that context is instructive here. *See, id.* at 737-739.

cannot be abrogated, consistent with a long line of decisions of this Court, without there first being a rigorous analysis and evaluation of its rights as against the asserted interests of MSHA in having non-employee union organizers (1) accompany MSHA inspectors at its mine, (2) examine its private records (either with an inspector, or without, in the case of employee training records, 30 C F.R. §§ 48.9, 48.29), and (3) participate as a party in litigation between Kerr-McGee and the Secretary. *See* 29 C.F.R. § 2700.4 and 30 C.F.R. § 44.3. This Court's approach has consistently been to balance private property interests with asserted regulatory interests, presumably as a part of the long accepted approach of construing statutes so as to avoid squarely confronting a Constitutional issue. The cases have consistently balanced asserted statutory interests with the private property interests of a company, regardless of the seeming clarity of the statutory provision, or its interpretation by an administrative agency.

The departure from that approach by the Commission and the D.C. Circuit has grave implications not only for mining and other employers, but also for all who are subject to governmental regulation. These issues are important and recurring. Certiorari should be granted both to reject this departure from the accepted framework of balancing of competing interests and review of administrative action and to insure that Constitutionally protected interests and private property are preserved.

## CONCLUSION

*Amici curiae* support the Petition for a Writ of Certiorari by Petitioner Kerr-McGee, and respectfully pray that the Court grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 7 1995
OFFICE OF THE CLERK

(3)

No. 94-1685

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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KERR-MCGEE COAL CORPORATION, PETITIONER

*v.*

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

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## QUESTION PRESENTED

Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(f), provides that, subject to regulations issued by the Secretary of Labor, a representative of miners can accompany the Secretary or his authorized representative during a mine inspection. The Secretary's regulations (30 C.F.R. 40.1(b)(1)) permit "[a]ny person or organization which represents two or more miners" to exercise this "walkaround" right, and the Secretary has construed the statute and regulations to mean that a labor organization may serve as a miners' representative, regardless of whether it also represents the miners for collective bargaining purposes under the National Labor Relations Act. The question presented is whether the court of appeals correctly held that the Secretary's interpretation is reasonable.

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 40 F.3d 1257. The decisions of the Federal Mine Safety and Health Review Commission (Pet. App. 22-43) and the administrative law judge (Pet. App. 44-70) are reported at 15 F.M.S.H.R.C. 352 and 13 F.M.S.H.R.C. 1889, respectively.

### JURISDICTION

The judgment of the court of appeals was entered on December 2, 1994. A petition for rehearing was denied on January 17, 1995. Pet. App. 71-72. The petition for a writ of certiorari was filed on April 14, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. 801(g). The Secretary of Labor has "broad authority * * * to promulgate regulations governing the mining industry and to investigate and remedy safety concerns." Pet. App. 3. He enforces the Act through the Mine Safety and Health Administration (MSHA). 29 U.S.C. 557a.

The Act directs the Secretary to conduct "frequent inspections" of mines. 30 U.S.C. 813(a); see *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771, 774 (1994). If the Secretary finds a violation of the Act or of a health or safety standard, rule, or order, he must issue a citation specifying a reasonable time in which to abate the violation. 30 U.S.C. 814(a). In certain circumstances, the Secretary must also order the operator to withdraw all persons from the affected area until the violation is abated. 30 U.S.C. 814(b) and (d)-(g), 817(a) and (b). For each cited violation, the Secretary must propose the assessment of a civil penalty of up to $50,000. 30 U.S.C. 815(a), 820(a) (Supp. V 1993). If an operator fails to correct the violation, the Secretary may propose a daily penalty of up to $5,000 until it is abated. 30 U.S.C. 815(b), 820(b) (Supp. V 1993); *Thunder Basin*, 114 S. Ct. at 775 & n.4. Each order, citation, notice or decision must be "immediately posted" by the operator at the mine. 30 U.S.C. 819(a).

A mine operator may contest a citation or withdrawal order by seeking a hearing before the Federal Mine Safety and Health Review Commission, an independent adjudicatory agency. See 30 U.S.C. 815(d), 823. An administrative law judge (ALJ) performs the first level of such review. 30 U.S.C. 823(d)(1). Any party "adversely affected or aggrieved" by the ALJ's decision may seek discretionary review by the Commission, 30 U.S.C. 823(d)(2)(A)(i), followed by review in the appropriate court of appeals, 30 U.S.C. 816(a)(1); see *Thunder Basin*, 114 S. Ct. at 776-777.

b. The Mine Act provides that, subject to regulations promulgated by the Secretary, "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his * * * representative" during mine inspections. 30 U.S.C. 813(f). This "walkaround" right is "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." *Ibid.* In addition, miners' representatives "may obtain certain health and safety information and promote health and safety enforcement." *Thunder Basin*, 114 S. Ct. at 774 (footnote omitted) (citing 30 U.S.C. 813(c), 813(g)(1) and (2), 815(d), 817(e)(1), 819(b); 30 C.F.R. 44.3, 48.3, 48.23, 75.220, 77.1101, 77.1713); see also Pet. App. 4 n.5.

The Secretary has promulgated regulations governing the selection of miners' representatives. See 30 C.F.R. Pt. 40 (Pet. App. 74-78); 43 Fed. Reg. 29,509 (1978). The regulations define a "[r]epresentative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. 40.1(b)(1). A

representative must file certain information with MSHA concerning his or her identity and designation, and must provide a copy of that information to the mine operator. 30 C.F.R. 40.2, 40.3. The operator must, in turn, post that information at the mine. 30 C.F.R. 40.4; see *Thunder Basin*, 114 S. Ct. at 774-775.

2. Petitioner operates the Jacobs Ranch Mine, a surface coal mine in Wyoming. In July 1990, seven of its miners designated the United Mine Workers of America (UMWA) and two UMWA employees as their representatives under Section 103(f) of the Act, 30 U.S.C. 813(f). Neither the UMWA nor any other labor organization represents petitioner's miners for purposes of collective bargaining under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* Pet. App. 7, 24. The UMWA mailed the requisite designation forms to MSHA and petitioner. When petitioner refused to post the forms, an MSHA inspector issued a citation for violation of 30 C.F.R. 40.4, followed by a failure-to-abate order. After daily fines were proposed, petitioner posted the notice, and it contested the citation and order. Pet. App. 6-7, 24-27, 51-54.

3. An ALJ sustained the citation and assessed a penalty of $300. Pet. App. 44-70. The ALJ noted that the Mine Act and the regulations under it impose no restrictions on who may become a miners' representative. *Id.* at 61. In light of the different purposes of a "representative" under the NLRA and the Mine Act, the ALJ "f[ou]nd merit in MSHA's position that there is no conflict between the Mine Safety and Health Act and the [NLRA] in their application here," and "no merit" in petitioner's argument that it was not legally required to recognize the UMWA as the miners' walkaround representative under the

Mine Act because the UMWA was not the miners' collective bargaining representative under the NLRA. *Id.* at 62, 68.[1]

4. The Commission affirmed. Pet. App. 22-43. It reiterated its holding in *Emery Mining Corp.* v. *Secretary of Labor*, 10 F.M.S.H.R.C. 276 (1988), aff'd *sub nom. Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) (*UP&L*), that a nonemployee may become a miners' representative under Section 103(f) because that provision "imposes no employee-status limitation as to whom [miners] may choose." Pet. App. 37. The Commission "discern[ed] no basis" for limiting union representatives to those "that also represent[] the miners for collective bargaining purposes." *Id.* at 38. It agreed with the Secretary that a representative's conduct "during a walkaround * * *, rather than [his] motivation[,] * * * must be examined to determine whether there has been abuse," *id.* at 39-40, and determined that any concerns about possible abuse here were purely "speculative" and could be

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[1] The ALJ reasoned that "[u]nder the [NLRA], a representative is elected by a majority of the workers * * * to present the needs of the employees to the employer, concerning terms and conditions of employment," while under the Mine Act, "a representative can be chosen by only two or more miners * * * solely for the purpose of accompanying the mine inspector during his inspection." Pet. App. 62-63. The ALJ continued (*id.* at 63 n.9): "MSHA seeks a representative of miners * * * to point out any problems that miners may have noticed. The representative remains with the inspector during the investigation and his only allowed activity is that of advising and observing the mine inspector. Should the representative engage in any other activity, he will be asked to leave and another representative will join the inspector."

"addressed on an individual basis" when and if they occurred, *id.* at 40.

The Commission noted that the Secretary, in promulgating the regulations, had concluded that it would be inappropriate to incorporate "the concept of collective bargaining representation under the NLRA" into Section 103(f) of the Mine Act. Pet. App. 40. The Commission agreed, explaining that the different purposes of the two Acts—the NLRA's "broad[] guarantees" with respect to collective bargaining generally, and the Mine Act's "pervasive[] regulat[ion] [of] the safety and health of employees in one industry"—rendered NLRA restrictions on nonemployee access to the workplace "inapplicable" to the Mine Act. *Id.* at 40-41. For that reason, the court concluded, this Court's decision in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), which "was concerned with 'the relationship between the rights of employees under § 7 of the [NLRA] * * * and the private property rights of employers,'" Pet. App. 41-42 (quoting 502 U.S. at 529), did not affect the right of miners to choose a nonemployee union agent as a walkaround representative under the Mine Act, which "entails pervasive regulation and a diminished expectation of full enjoyment of private property rights," Pet. App. 42 (citing *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981)).

5. The court of appeals affirmed, Pet. App. 1-21, holding that in light of the Act's "broad grant of authority to the Secretary," his interpretation of Section 103(f) is reasonable. *Id.* at 2-3, 9. The court first observed that under the Secretary's regulation, see 30 C.F.R. 40.1(b)(1), "organizations" may serve as representatives. Pet. App. 10. It also noted that the Secretary, in the regulatory preamble, had clearly

rejected the NLRA definition of "representative." *Ibid.* (citing 43 Fed. Reg. 29,508 (1978)). The court therefore concluded that the Secretary's interpretation of his own regulations is reasonable. Pet. App. 10.

The court also found no support in the Act itself for limiting representative status in the manner petitioner urged. Examining Section 103(f)'s guarantee of continued compensation to a "representative of miners who is also an employee of the operator," 30 U.S.C. 813(f), the court agreed with the Tenth Circuit that "[b]y creating a subclass of representatives who are entitled to compensation while exercising walkaround rights * * *, Congress clearly recognized that some miners' representatives may be employees of the operator and some may not." Pet. App. 11 (quoting *UP&L*, 897 F.2d at 450).

Petitioner's narrow construction of the Act "fare[d] no better" under the legislative history, in which the court found no indication that Congress regarded third-party participation as inconsistent with the Mine Act's goals of miner education and participation. Pet. App. 12. On the contrary, the conference report on the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), Pub. L. No. 91-173, 83 Stat. 742, stated that the term "representative" included organizations that did not represent miners "under other labor laws." Pet. App. 13 n.10 (quoting H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 67 (1969)). In light of Congress's choice not to alter the statutory text or to express a contrary intent in the current Act, and Congress's "clear concern about miners' safety," the court found the Secretary's interpretation consistent with the Act's objectives. Pet. App. 13. The court

noted the benefit to miners of permitting non-employees to serve as walkaround representatives, including their expertise and their freedom from employer reprisal. *Ibid.*

The court also rejected petitioner's claim that the mere potential for abuse made the UMWA's motive in achieving walkaround status a *per se* abuse of the Mine Act. Like the Tenth Circuit in *UP&L*, 897 F.2d at 452, the court concluded that an operator should respond to individual instances of abuse "when it discovers them," and that a union that "actually misused" its statutory authority would forfeit "its right to serve as a miners' representative." Pet. App. 14-15 & n.12.

Finally, the court held that petitioner's reliance on *Lechmere* was misplaced. Pet. App. 3, 16. First, it reasoned that the balance struck by the Court in *Lechmere* between the property rights of employers and the access rights of third parties had no application to the Mine Act, in which Congress itself had granted specific rights to third parties and had therefore already "conducted the balancing." *Id.* at 18. Second, unlike in *Lechmere*, no prior decision of this Court limited the agency's discretion to adopt the challenged interpretation; indeed, in *Thunder Basin*, which involved the regulations at issue here, the Court had observed that "Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators." Pet. App. 18 n.16 (quoting 114 S. Ct. at 781 n.21). Third, because the property rights of employers derive "from state common law," not the NLRA, the court concluded that the Secretary had not ignored NLRA policies in allowing the UMWA to serve as a miners' representative under the Mine Act here. Pet.

App. 18 (quoting *Thunder Basin*, 114 S. Ct. at 781 n.21).

Judge Sentelle concurred. Pet. App. 19-21. He emphasized that the court had addressed only the Secretary's interpretation of the Mine Act. Because the parties had not challenged the constitutionality of the Act as construed by the Secretary, Judge Sentelle noted, that question was not addressed in the court of appeals' opinion. *Id.* at 20-21.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. This case presents a single question of statutory interpretation (see Pet. i): whether the Secretary has reasonably construed Section 103(f) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(f), to allow a union to serve as a miners' representative where it is not also the miners' collective bargaining representative under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* Section 103(f) authorizes "a representative of the operator and a representative authorized by his miners" to accompany the Secretary during a mine inspection, 30 U.S.C. 813(f), and the implementing regulation, 30 C.F.R. 40.1(b)(1), permits "[a]ny person or organization which represents two or more miners" to serve as the representative.

Because Section 103(f) imposes no limitations on who may become a miners' representative, the Secretary's determination that a union authorized by two or more miners at a nonunion mine may exercise the miners' walkaround rights fully accords with the

text of the Mine Act, as well as its "broad safety-forcing goals." *Emerald Mines Co.* v. *FMSHRC*, 863 F.2d 51, 53 (D.C. Cir. 1988). By contrast, petitioner's contention (Pet. 18) that Section 103(f) "is best read to mean [that only] one of the miners themselves or the miners' certified collective bargaining representative" may serve as a walkaround representative reads a limitation into the Act that nowhere exists and that disserves the safety interests of miners. The Secretary's construction therefore was properly sustained by the court below under the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Indeed, the only two courts of appeals that have addressed the question have concluded that Section 103(f) imposes no "limitation on the employment status of the [miners'] representative." Pet. App. 12 (emphasis omitted) (quoting *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447, 450 (10th Cir. 1990) (*UP&L*)).[2] Although the issue in *UP&L* was

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[2] The court below upheld (Pet. App. 10) the Secretary's interpretation of 30 C.F.R. 40.1(b)(1) as permitting, without qualification, two or more miners to select an organization as their walkaround representative. The court observed (Pet. App. 10 (citing 43 Fed. Reg. 29,508 (1978)) that in promulgating the regulation, the Secretary "expressly consider[ed] and reject[ed] the notion that miners' representatives must be selected by a majority of miners," as under the NLRA. Petitioner does not challenge the Secretary's interpretation of his own regulation. Instead, petitioner asserts (Pet. 10 n.3) that the court misunderstood the phrase "his miners" in Section 103(f) to refer to the representative's, rather than the operator's, miners. There is no reason to believe, however, that the court was confused about the antecedent of "his" in Section 103(f), much less that its analysis hinged upon such a reading.

whether nonemployee union agents could serve as miners' representatives at a mine where the union was the collective bargaining agent under the NLRA, the court placed no reliance on that fact in upholding the designation, but instead reasoned that the broad language of Section 103(f) is "dispositive" of the issue. 897 F.2d at 450.[3] Accord *Council of S. Mountains, Inc.* v. *FMSHRC*, 751 F.2d 1418, 1421 n.18 (D.C. Cir. 1985) ("The Mine Act * * * does not articulate any distinction between the rights of employee and nonemployee representatives."); *Secretary of Labor on Behalf of Truex* v. *Consolidation Coal Co.*, 8 F.M.S.H.R.C. 1293, 1298 (1986). Moreover, both the court below and the Tenth Circuit correctly determined that Section 103(f)'s guaranty of "no loss of pay" during an inspection for a miners' representative "who is also an employee of the operator" "creat[es] a subclass of representatives who are entitled to compensation," and reveals Congress's "clear[] recogni[tion]" that both employees and nonemployees would serve as representatives. Pet. App. 11 (quoting *UP&L*, 897 F.2d at 450). Thus, there is no circuit conflict on the sole question presented.

2. a. The Secretary's interpretation of Section 103(f) accords with the Mine Act's overriding purpose of protecting the health and safety of miners. *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771, 774 (1994); 30 U.S.C. 801(g). The Act represents Congress's response to the "notorious history" of health and safety problems in the mine industry.

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[3] In *Thunder Basin Coal Co.* v. *FMSHRC*, No. 94-9563, the Tenth Circuit currently has before it the precise question presented by this case under essentially identical circumstances.

*Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981); see *United Mine Workers* v. *FMSHRC*, 671 F.2d 615, 626 n.42 (D.C. Cir.), cert. denied, 459 U.S. 927 (1982); 123 Cong. Rec. 4387 (1977) (remarks of Sen. Williams). To accomplish its purpose, the Act imposes "pervasive and defined" regulation on mine operators, including provisions for warrantless and unannounced inspections, *Dewey*, 452 U.S. at 603; grants "broad authority" to the Secretary "to compel * * * compliance," *Thunder Basin*, 114 S. Ct. at 775; and contemplates the "active" participation of "miners and their representatives," *Council of S. Mountains*, 751 F.2d at 1420 (citing S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977)); see also Pet. App. 13; *UP&L*, 897 F.2d at 451 & n.2; *Magma Copper Co.* v. *Secretary of Labor*, 645 F.2d 694, 698 (9th Cir.), cert. denied, 454 U.S. 940 (1981).

The Secretary has consistently recognized that the Act's "safety-forcing" goal, *Emerald Mines*, 863 F.2d at 58, is best served by encouraging all miners, through their representatives, to exercise their statutory rights. See *UP&L*, 897 F.2d at 452. For example, the Secretary has construed Section 103(f) since its enactment to permit two or more miners to designate nonemployee representatives, rather than to restrict them to a lone majority representative. As the Secretary recognized in the regulatory preamble, 43 Fed. Reg. 29,508 (1978), "[t]he purposes of the Mine Act are better served by allowing multiple representatives" at each mine, thereby guaranteeing "that all miners have the opportunity to exercise their

right to select the representative of their choice" for purposes authorized by the Act.[4]

The miners in this case who designated the UMWA as their representative availed themselves of the union's ability to "contribute to an inspection in ways that miners themselves cannot," either through the representatives' greater safety and health expertise or greater immunity from "the threat of pressure from the employer." Pet. App. 13; see *id.* at 15 & n.13; *UP&L*, 897 F.2d at 451-452; *Council of S. Mountains*, 751 F.2d at 1421. Thus, the Secretary's interpretation effectuates the "[g]reater miner participation" Congress deemed essential to the Act, *UP&L*, 897 F.2d at 451 n.2, and the court of appeals correctly deferred to the Secretary's protective construction of this safety legislation. *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980).

b. In contrast, petitioner's narrow construction of Section 103(f), under which only employees and their NLRA collective bargaining agents may serve as miners' representatives, would thwart the goals of the Mine Act. See *UP&L*, 897 F.2d at 456; *Magma Copper*, 645 F.2d at 698. Under the NLRA, Congress intended employees to exercise "full freedom of association [and] self-organization," 29 U.S.C. 151, by

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[4] Petitioner's reliance (Pet. 17) on an interpretive bulletin issued by the Secretary in 1978 is entirely misplaced. The bulletin is silent as to whether nonemployees may serve as miners' representatives. *UP&L*, 897 F.2d at 452. Moreover, while the bulletin recognizes (43 Fed. Reg. 17,548 (1978)) that miners familiar with the "day to day operations" of a mine can aid an inspection, third parties who "ha[ve] held virtually every job in a coal mine," such as certain UMWA employees who have become designated as miners' representatives, no doubt also possess such familiarity. *UP&L*, 897 F.2d at 451.

choosing a *single* majority representative for purposes of collective bargaining. *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Under petitioner's view, however, only those miners who have already exercised their rights under the NLRA may exercise their right to select a nonemployee walkaround representative under the Mine Act, "thereby creating distinctions between unionized and nonunionized miners that have no basis in the statute." Pet. App. 39. Indeed, under petitioner's view, even a majority of miners at a mine could not designate a walkaround representative if they had not previously designated that entity as their collective bargaining agent under the NLRA. The Mine Act's reliance on the ongoing participation of *all* miners in health and safety matters cannot be served by depriving them of a nonemployee representative unless and until a majority of them have exercised their rights in a particular way under another statute. See *Local 1976, United Bhd. of Carpenters & Joiners* v. *NLRB*, 357 U.S. 93, 110 (1958).

3. There is likewise no merit to petitioner's contention (Pet. 21) that because the Secretary has provided that "representatives" under the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, generally are to be employees, his different implementation of the Mine Act is unreasonable.[5]

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[5] Under the OSH Act, "a representative authorized by [an employer's] * * * employees" may accompany the Secretary or his authorized representative during a physical inspection of the workplace. 29 U.S.C. 657(e). Regulations provide that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer," but also provide that a "third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer)" can participate in

Although the Mine Act parallels the OSH Act in certain respects, Congress's "intense concern" with conditions in the mines led it to enact "a sharply focused statute" directed at a single industry, as opposed to the OSH Act, which regulates "all types of safety and health hazards throughout American industry." *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1232 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); see *Dewey*, 452 U.S. at 603. Indeed, Congress recognized that mining is "so unique, so complex, and so hazardous as to not fit neatly under the [OSH] Act." *Dewey*, 452 U.S. at 603 n.8 (quoting H.R. Rep. No. 312, 95th Cong., 1st Sess. 1 (1977)).

Congress accordingly did not pattern the Mine Act solely on the OSH Act; it also "use[d] the stronger features of the Coal Act [Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742] as the foundation for a new and comprehensive mine safety and health law which is applicable to the entire mining industry." 123 Cong. Rec. 4387 (1977) (Sen. Williams). Significantly, one such feature of the predecessor Coal Act was the authorization of nonemployee miners' representatives. Section 103(h) of the Coal Act provided that "the authorized representative of the miners at the mine * * * shall be

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the inspection upon a showing of "good cause" that such participation "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." 29 C.F.R. 1903.8(c). Petitioner points to no authority that prohibits the making of such a showing to justify participation by a union at a nonunion workplace. Cf. *In re Establishment Inspection of Caterpillar, Inc.*, No. 94-3453 (7th Cir. May 25, 1995) (striking employee may be walkaround representative under OSH Act; inspector's authority and OSH Act procedures adequately guard against abuse).

given an opportunity to accompany the authorized representative of the Secretary on [an] inspection." 83 Stat. 750. Congress intended "representative" under the Coal Act to include "any individual or organization that represents any group of miners at a given mine," without regard to whether the representative was "recognized * * * under other labor laws." Pet. App. 13 n.10 (quoting H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 67 (1969)). The applicable regulation, 30 C.F.R. 81.1(b) (1976), similarly provided that a representative "means any person or organization which represents two or more miners at a coal mine for purpose[s] of the Act." Against this background, it clearly was reasonable for the Secretary, in determining the range of representation available to miners, to follow the Coal Act, upon which the Mine Act was more directly modeled in these respects, while striking a somewhat different balance in implementing the OSH Act.

4. Petitioner insists (Pet. 15) that under Section 103(f), miners may designate only those representatives who have "*the* purpose," and no other, of aiding the inspection. Petitioner's would-be exclusion of so-called "'mixed motive' representatives" (Pet. 15), however, falls wide of the mark. Anyone—including employees and collective bargaining agents—may have additional motives in serving as a walkaround representative. The Secretary's focus on "the actual conduct of the miners' representative during the inspection," Pet. App. 39, far better effectuates the Act's purposes than would a regime requiring the Secretary to police the varied (and presumably lawful) motives of each and every walkaround representative.

As the court below reasoned (Pet. App. 15), motives are "irrelevant" as long as the representative "does

not abuse its designation and serves the objectives of the Act." The Act's "predictable and guided * * * regulatory" scheme already provides a "specific mechanism" for accommodating a mine owner's particular concerns regarding an inspection. *Dewey*, 452 U.S. at 604-605; *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3d Cir. 1979) (protecting against disclosure of trade secrets), cert. denied, 444 U.S. 1015 (1980).[6] The Secretary's representative, who retains control over the mine inspection at all times, can prevent misconduct of whatever kind by directing the miners' representative to leave. See Pet. App. 59. There accordingly is no reason why "such [hypothetical] abuse * * * cannot be remedied on an individual basis under the Mine Act." *Thunder Basin*, 114 S. Ct. at 781; *UP&L*, 897 F.2d at 452; see Pet. App. 15. The mere potential for abuse is no reason to engraft a "drastic limitation" from another statute onto the Act, *Hercules, Inc.* v. *EPA*, 938 F.2d 276, 280-281 (D.C. Cir. 1991)—especially since designation of expert nonemployee representatives furthers the goal of miner participation, Pet. App. 15 & n.13, and thereby furthers the Secretary's enforcement of the Act. *United Mine Workers*, 671 F.2d at 626.

5. The court below correctly rejected petitioner's reliance (Pet. 12-15) on *Lechmere, Inc.* v. *NLRB*, 502

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[6] As in *Thunder Basin*, there is no evidence that the UMWA or its employees ever accompanied the Secretary's representative on an inspection of petitioner's mine. Because representatives cannot receive advance notice of the Act's mandatory inspections, "the ability of the nonemployee UMWA designees to exercise these limited walk-around rights is speculative." 114 S. Ct. at 781.

U.S. 527 (1992). In that case, the Court "clarif[ied] the relationship between the rights of employees under § 7 of the [NLRA] * * * and the property rights of their employers." *Id.* at 529. The Court emphasized that Section 7 of the NLRA, 29 U.S.C. 157, confers rights only on employees, not on labor organizations, and it reiterated the general rule of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that an employer may prohibit "nonemployee distribution of union literature" on its property, unless the employees, because of where they live or work, are "beyond the reach of reasonable union efforts to communicate with them." *Lechmere*, 502 U.S. at 538-539 (quoting *Babcock & Wilcox*, 351 U.S. at 112, 113 (emphasis omitted)).

*Lechmere* has no application to the Mine Act. As the court below noted, in contrast to the NLRA, which confers no rights on employee representatives, the Mine Act "defines [their] rights * * * and specifies the level of intrusion on private property interests necessary to advance the safety objectives of the Act." Pet. App. 17; see *Thunder Basin*, 114 S. Ct. at 781 (Act does not confer "uncontrolled access right to the mine property to engage in any activity that the miners' representative wants"). By the same token, the Mine Act's pervasive regulatory scheme entails a generally diminished expectation of privacy on the part of mine operators. *Dewey*, 452 U.S. at 599-600; see also *Thunder Basin*, 114 S. Ct. at 781 n.21 ("Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators"); Pet. App. 18 n.16. As a result, there is no basis for petitioner's claim (Pet. 13) that the balance struck in *Lechmere* between employers' property rights and union organizers'

access rights precludes access here by miners' representatives who do not represent miners for NLRA purposes but who have been selected by miners to exercise their distinct walkaround rights under the Mine Act. Congress struck a different balance in the Mine Act that accommodates the interests of all miners, in union and nonunion mines alike, to be represented by persons of their choosing during enforcement inspections and proceedings. Pet. App. 3-4.

Because Section 103(f) of the Mine Act has no relation to the NLRA, there is no merit to petitioner's suggestion (Pet. 22) that the Court should hold the petition in this case pending a decision in *NLRB* v. *Town & Country Elec., Inc.*, cert. granted, 115 S. Ct. 933 (1995). The determination in that case of who is an *employee* under the NLRA entitled to Section 7's protections cannot resolve the entirely distinct question whether the Mine Act authorizes *nonemployees* to become miners' representatives.

6. Despite petitioner's belated attempt to raise the specter of a constitutional question in this case (Pet. 18-22), no such question is presented for the Court's review. As Judge Sentelle emphasized in his concurring opinion below (Pet. App. 20-21), petitioner failed to raise any constitutional challenge in the court of appeals, and the court did not decide the constitutionality of the walkaround right at issue in the case. Therefore, the issue is waived. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Petitioner's bare assertion that a constitutional issue implicating the Takings Clause "lurk[s]" in this case (Pet. 19 (quoting Pet. App. 20)) cannot suffice to place such an issue before the Court. See *Aircraft &*

*Diesel Equip. Corp.* v. *Hirsch*, 331 U.S. 752, 763 (1947); see also *Pennell* v. *City of San Jose*, 485 U.S. 1, 10 (1988); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-295 (1981).

In any event, the Takings Clause does not advance petitioner's case. That constitutional provision requires the government to provide compensation where it has effected a "taking" of private property, either through physical appropriation or occupation, or by depriving the owner of the economically viable use or value of the property through regulation that imposes a burden on the property owner that "should be borne by the public as a whole." *Yee*, 503 U.S. at 523; see, *e.g.*, *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-2895 (1992); *Virginia Surface Mining*, 452 U.S. at 295-296. Permitting third parties to accompany a mine inspector during inspections of the mine for law enforcement purposes, however, does not amount to a physical occupation for which compensation is due.[7]

Petitioner does not challenge the Mine Act's authorization for MSHA inspectors to enter the premises, and this Court has held that it is

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[7] Unlike the statutory measures at issue in the takings cases on which petitioner relies, the Mine Act does not confer on the public—or on nonemployee miners' representatives—a "continuous right to pass to and fro * * * even though no particular individual is permitted to station himself permanently upon the premises." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (public easement across residential property); see *Dolan* v. *City of Tigard*, *supra* (dedication of portion of commercial property as bicycle pathway easement); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (public access to dredged lagoon).

"reasonable" within the meaning of the Fourth Amendment for them to do so even without a warrant, in view of the dangerous and pervasively regulated nature of mining. See *Dewey*, 452 U.S. at 602-604. A mine operator can therefore have no reasonable investment-backed expectation that it may prevent inspections of its property. Cf. *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2291-2292 (1993). The incremental intrusion on the mine operator's property interests that would result from the presence of a miners' representative along with the inspector is negligible. As the court below pointed out in rejecting petitioner's reliance on *Lechmere*, the Mine Act "does not convey an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants." Pet. App. 17 (quoting *Thunder Basin*, 114 S. Ct. at 781). The Mine Act represents Congress's accommodation, in this pervasively regulated and notoriously dangerous industry, between the property rights of mine operators and the access rights of third parties. *Thunder Basin*, 114 S. Ct. at 781 n.21; *Dewey*, 452 U.S. at 603; Pet. App. 17-18. Whatever limited incursion this regulatory scheme might work from time to time on a mine operator's asserted right to exclude others from its property (see Pet. 20), there can be no claim that Section 103(f) "has unfairly singled out" petitioner to bear a burden that should be shared by the public, *Yee*, 503 U.S. at 523, or that the Act "prevent[s] beneficial use of coal-bearing lands," *Virginia Surface Mining*, 452 U.S. at 296.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

Supreme Court, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

(4)

No. 94-1685

In The

# Supreme Court of the United States

October Term, 1994

KERR-MCGEE COAL CORPORATION,

*Petitioner,*

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## REPLY BRIEF FOR PETITIONER

The question in this case is whether the court of appeals correctly construed Section 103(f) of the Federal Mine Safety and Health Amendments Act of 1977 (the Act), 30 U.S.C. § 813(f), to permit as few as two miners to appoint a labor union as a miners' inspection "representative" at a nonunion mine, thereby granting non-employee union officials access to the nonunion mine in contravention of the mine owner's common law property right to exclude such officials from the premises. As explained in our petition, the court of appeals' conclusion that just seven of the approximately 270 miners at the Jacobs Ranch Mine could appoint as their Section 103(f)

representatives nonemployee organizers of the United Mine Workers of America (UMWA) – even though the UMWA does not represent Jacobs Ranch miners for collective bargaining purposes – flies in the face of three firmly-established interpretive principles. First, statutes in derogation of the common law – in particular common law property rights – are to be strictly construed. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Second, statutes should be construed to avoid serious constitutional questions. *See* Pet. 19 (citing cases). Third, little deference is owed to an agency's conflicting interpretation of statutory language.

1. It is well established that "statutes in derogation of the common law are to be strictly construed." 2B N. Singer, *Sutherland Statutory Construction* § 56.03, at 310 (5th ed. 1992). *See, e.g., United States v. Texas*, 113 S. Ct. 1631, 1634 (1993); *United States v. Fausto*, 484 U.S. 439, 454 (1988). As this Court explained in *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603, 623 (1813)), "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.' "

This principle was the driving force in *Lechmere*. The Government erroneously argues that "*Lechmere* has no application to the Mine Act" (Opp. 19) and apparently would confine that case to the context of the National Labor Relations Act (NLRA). In *Lechmere* and prior cases, this Court held that the NLRA should be construed to respect so far as is possible the common law right of

employers to exclude from their property nonemployee union organizers. *See Lechmere*, 502 U.S. at 532 ("an employer's right to exclude nonemployee union organizers from his property" yields only "in certain limited circumstances"); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (right required to yield only "to the extent needed"). The teaching of *Lechmere* is that when construing statutes such as the NLRA courts must "start from the proposition that employers may control activities that occur in the workplace, both as a matter of property rights (the employer owns the building) and of contract (employees agree to abide by the employer's rules as a condition of employment)." *Guardian Industries, Inc. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (Easterbrook, J.). *Lechmere* thus represents an application of "a well-recognized rule of statutory construction, flowing from a strong policy of respecting traditional property rights." *United States v. Rodgers*, 461 U.S. 677, 717 n.5 (1983) (Blackmun, J., concurring in part and dissenting in part). In short, *Lechmere* cannot be confined to the NLRA context, because the principle upon which it was based cannot be so confined.

Like the NLRA, the Mine Act confers certain statutory rights upon employees which, if construed too broadly, would trample upon the common law property right of employers to determine who shall set foot on their premises.[1] Following the approach taken in *Lechmere*, the Mine Act should be construed, to the extent

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[1] The Government does not dispute that the right to exclude others is "one of the most essential sticks in the bundle of rights commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Nor could it. To the extent

possible, to respect the property rights of mine owners. Those rights are honored – and the safety objectives of the Mine Act in no way compromised – by construing the term miners' "representative" in Section 103(f) of the Mine Act to mean one of the miners or the miners' collective bargaining representative. Pet. 18.

2. The decision of the court of appeals also contravenes the principle that statutes should be construed to avoid raising a serious question as to their constitutionality. Pet. 18-21. The Government argues that "petitioner failed to raise any constitutional challenge in the court of appeals" (Opp. 20) and thus has waived any such challenge in this Court. Petitioner's argument, however, is that the Mine Act should be construed to *avoid* a constitutional question. The issue of the Mine Act's proper construction was the precise issue before the court of appeals,[2] and that court can properly be faulted for failing to apply the interpretive canon identified by petitioner. Thus, the issue raised in the petition has not been waived.

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the Government argues that the Mine Act was intended to abrogate the property rights of mine owners in wholesale fashion, it is mistaken. *See Donovan v. Dewey*, 452 U.S. 594, 604 (1981) (recognizing that the Mine Act shows some appreciation for the "special privacy concerns" of mine owners).

[2] Agreeing with the court of appeals in this case, and following its own decision in *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990), the Tenth Circuit recently held that union organizers may act as miners' representatives. *Thunder Basin Coal Co. v. FMSHRC*, No. 94-9563, 1995 WL 337423 (10th Cir. June 7, 1995).

That the court of appeals' construction of the Mine Act raises a serious constitutional question cannot be doubted. As this Court has recognized, it is a transparent violation of the Takings and Due Process Clauses for the state to require a property owner to surrender an easement without providing just compensation. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). That is essentially the effect of the Mine Act. As construed by the court of appeals, the Act allows as few as two miners to designate anybody their "representative" and thereby authorize that person to trespass upon a mine owner's private property. The constitutional infirmity of that power was recognized by Judge Sentelle:

> To say that the Congress can constitutionally pass laws permitting inspections of mine premises is one thing; to say that it can compel mine owners to permit onto their premises private individuals whose only claim to presence is selection by two of the property owners' employees is quite another. I dare say that the very attorneys representing the plaintiffs in this case would think their constitutional rights ill used if a legislative body were to require them to permit into their offices, file rooms, and conference areas anyone whom two of their secretaries, messengers, or paralegals chose to invite. [Pet. App. 20-21 (concurring opinion).]

3. The Government argues that the interpretation of the Mine Act rendered by the court of appeals should be given deference because it is the Secretary of Labor's interpretation. Opp. 10, 13-14. In the circumstances of this case, however, no deference is owed to the Secretary. This

Court has said that an agency's interpretation of a statute that conflicts with a prior interpretation is entitled to "considerably less deference" than a consistently held agency view. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2388 (1994); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981). That principle surely ought to apply here, where the Secretary's construction of the Mine Act is (1) inconsistent with the view expressed in an interpretive bulletin issued at the same time the Mine Act took effect (Pet. 17), and (2) contrary to his construction of virtually identical language found in another statute. Pet. 16 (discussing the Secretary's interpretation of Section 8(e) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 657(e)). The Government has not cogently explained the basis for the Secretary's conclusion that a "representative" for mine safety inspection purposes can be a non-employee union organizer, or literally anyone, but a "representative" for other workplace safety inspections "shall be an employee[ ] of the employer" (29 C.F.R. § 1903.8(c)) except in very unusual circumstances. In light of his arbitrary and inconsistent approaches to the interpretation of virtually identical statutory language in highly similar statutory schemes, the Secretary's construction of the Mine Act is worthy of no material deference.

4. Contrary to the Government's claim (Opp. 19-20), this case – if not granted outright – should be held pending this Court's disposition of *NLRB v. Town & Country Elec., Inc., cert. granted*, 115 S. Ct. 993 (1995) (No. 94-947). Pet. 22-24. The question in that case is whether union organizers can be "employees" within the meaning

of the NLRA. The question here is whether union organizers can be "representatives" within the meaning of the Mine Act. The lower court in *Town & Country* held that a union organizer – although within the literal reach of the statute – should not be considered an employee because such a construction would contravene an employer's common law right to demand undivided loyalty from employees. Here, we argue in like fashion that a union organizer – although arguably within the literal reach of Section 103(f) – should not be considered a miner's representative because such a construction would contravene the employer's common law right to exclude organizers from its nonunion mine. It is plain that resolution of the former question in *Town & Country* could well shed light upon the proper resolution of the latter here.

Furthermore, the view of the court of appeals in *Town & Country* – that a union organizer cannot be an "employee" because he lacks undivided loyalty – if sustained would also tend to support petitioner's view that a union organizer cannot be appointed a miners' "representative" because the language of the Mine Act does not permit "mixed motive" representatives – *i.e.*, someone who has sought and obtained representative status in order to further the union's organizational efforts, rather than to vindicate the safety purpose of the statute. Pet. 15. Whether union organizers can avail themselves of statutory rights conferred for quite different reasons to promote their organizing efforts is an issue in both *Town & Country* and this case. *See* Pet. 24 & n.10; *see also Thunder Basin*, 1995 WL 337423 at *1 ("There is undisputed evidence that the [UMWA] designees hoped their status as

miners' representatives would help further their organizing goals").

## CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ. In the alternative, the petition should be held pending decision in *NLRB v. Town & Country Electric, Inc.*, No. 94-947, and disposed of as appropriate in light of the decision in that case.

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